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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Petitioner,

v.

SACRAMENTO COUNTY LOCAL AGENCY
FORMATION COMMISSION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the California Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state statute governing elections to incorporate new municipalities limits the franchise to residents of the area to be incorporated. Although the California Supreme Court found that residents of the other areas of the county are affected by incorporation, those residents are absolutely precluded from voting on the issue.

1. Is an individual's right to vote in municipal incorporation elections so "attenuated" that the Equal Protection Clause of the Fourteenth Amendment only requires that the statute rationally serve a legitimate state interest?

2. May the State's legitimate interests be rationally served by excluding or "fencing out" from the franchise a class of voters on the basis of how they may vote?

PARTIES

The petitioner, plaintiff and appellant in this action, is the Sacramento County Board of Supervisors. The plaintiffs and cross-respondents are the Sacramento County Deputy Sheriff's Association and Sacramentans To Save Our Services. The defendant and respondent is the Sacramento County Local Agency Formation Commission. The real-party-in-interest and respondent is the Citrus Heights Incorporation Project.

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PETITION FOR WRIT OF CERTIORARI

The Sacramento County Board of Supervisors petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

DECISIONS BELOW

The decision of the Court of Appeal of the State of California, Third Appellate District, is printed in petitioner's appendix at pages 27a through 75a. It is reported as *Board of Supervisors v. Sacramento Local Agency Formation Com.*, 6 Cal.App.4th 475 [——Cal. Rptr.2d ——] (1991). The opinion of the Supreme Court of the State of California is printed in petitioner's appendix at pages 1a through 26a. It is reported as *Board of Supervisors v. Local Agency Formation Com.*, 3 Cal.4th 903 [13 Cal.Rptr.2d 245; 838 P.2d 1198] (1992).

JURISDICTION

The judgment of the California Supreme Court in this case was entered on November 9, 1992. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Petitioners challenge the constitutionality of California Government Code Section 57103(a). Section 57103 provides as follows:

> In any resolution ordering a change of organization or reorganization subject to the confirmation of the voters, the conducting authority shall call an election:
>
> (a) Within the territory of each city or district ordered to be incorporated, formed, disincorporated, dissolved or consolidated.
>
> (b) Within the entire territory of each district ordered to be merged with or established as a subsidiary district of a city, or both within the district and within the entire territory of the city outside the boundaries of the district.
>
> (c) If the clerk certifies a petition pursuant to Section 57087.5 or 57087.7, within the territory of the district ordered to be merged with or established as a subsidiary district of a city.

(d) Within the territory ordered to be annexed or detached.

(e) If ordered by the commission pursuant to Section 56849 or 56850, both within the territory ordered to be annexed or detached and within all or the part of the city or district which is outside of the territory.

Cal. Gov't Code § 57103.

POTENTIAL INTERVENTION BY THE STATE OF CALIFORNIA

Petitioner questions the constitutionality of California Government Code section 57103(a). Accordingly, 28 U.S.C. § 2403(b) may be applicable.

STATEMENT OF THE CASE

A group known as the Citrus Heights Incorporation Project (hereinafter "CHIP") is seeking to create a new city within an urbanized portion of unincorporated territory in Sacramento County. To become effective, the proposed incorporation must first be approved by local election. The state election law grants the franchise only to the residents of the territory to be incorporated. Although directly and substantially affected by the outcome of the election, the remaining residents of the county have no vote in the election to approve the new city.

The present action is a petition for a writ of mandate and a complaint for injunctive relief challenging the constitutionality of the state election law. Petitioner seeks a declaration that the election law impermissibly impairs the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I. STATEMENT OF FACTS

The Cortese-Knox Local Government Reorganization Act of 1985 (Cal. Gov't Code §§ 56000, *et seq.*) (hereinafter "Cortese-Knox Act") provides that the incorpora-

tion of new cities is conducted largely under the auspices of specially-created, supra-local commissions for each unconsolidated county in the State.[1] Cal. Gov't Code §§ 56325, 56375. The Cortese-Knox Act charges these commissions, known as local agency formation commissions (hereinafter a "LAFCO"), with broad authority to approve, modify, or disapprove proposals to change local government boundaries in accordance with specified standards.

Proceedings for the incorporation of a new city are initiated by public petition or by an affected local agency's resolution. Cal. Gov't Code §§ 56650, 56800. After the application for a new city has been received, LAFCO commission hearings must be scheduled within 90 days. Cal. Gov't Code § 56828. At least five days prior to the hearing, the Executive Officer of the LAFCO is required to prepare a report on the proposed project and to make a recommendation on the application. *Id.* § 56833. If LAFCO approves the incorporation proposal, a formal resolution is prepared and forwarded to the "conducting authority" with directions to initiate proceedings in accordance with the resolution.[2] *Id.* §§ 56852, 56853, 57000. After hearing protests, the conducting authority shall order the incorporation of the new city subject to confirmation of the voters. *Id.* § 57077. The conducting authority then "shall call an election . . . [w]ithin the territory of each city . . . ordered to be incorporated . . . ." *Id.* §57103(a).

In the present case, respondent CHIP initiated incorporation proceedings by petitioning respondent Sacramento

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[1] General purpose local government in the State of California is generally entrusted to counties and cities. The State is divided into counties, Cal. Gov't Code § 23001, and generally speaking cities exist within a portion of the county. Within the boundaries of Sacramento County, there are currently four different cities.

[2] In the present case, the conducting authority is the petitioner Sacramento County Board of Supervisors. Gov't Code § 56029 (d)(1).

County Local Agency Formation Commission (hereinafter "Commission") to incorporate Citrus Heights as a new city. Shortly thereafter, the Commission's Executive Officer opened discussion on the issue of proposed incorporations and submitted a memorandum to the Commission in which he noted that Sacramento County (hereinafter "County") would lose revenue, service responsibility, and land-use authority through incorporation of the proposed new City of Citrus Heights. (App. 87a, 90a).

On April 8, 1987, Petitioner received a memorandum from the Executive Officer of the County detailing the impacts of incorporation on the County. In this report, the Executive Officer noted that upon incorporation, the new city would assume responsibility for providing certain municipal services which are currently provided by the County. At the same time, the County would lose tax revenue to the new city as a result of state law revenue-sharing provisions. However, the total amount of lost revenue would greatly exceed the reduced cost of providing services. The vast bulk of lost revenue would be diverted from the fund financing municipal services provided to residents of the unincorporated territory. (App. 92a-94a). Thus, the proposed incorporation would have a significant and detrimental impact on the services provided to these residents.[3]

At approximately the same time, the Commission's Executive Officer completed a Feasibility Analysis for the

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[3] In accordance with the California Environmental Quality Act (Cal. Pub. Res. Code §§ 21000, *et seq.*), the Sacramento County Environmental Impact Section prepared an Initial Study on the proposed incorporation of Citrus Heights. Because Citrus Heights contains a more intensive commercial tax base than most other unincorporated areas of the County, the Initial Study noted, "its exclusion from the unincorporated area tax base would likely diminish the overall levels of public services provided by the County to the remaining unincorporated areas, thus creating a burden and hardship for residents of those areas who may already consider the existing levels of service to be inadequate." (App. 91a).

proposed Citrus Heights incorporation as required under the Cortese-Knox Act. This document summarized the fiscal impact of incorporation and concluded that the new City of Citrus Heights would, to the County's detriment, be the recipient of tax revenues exceeding projected city service expenditures by $3,681,793.[4] (App. 97a-100a).

> From a fiscal perspective, [the incorporation of Citrus Heights] is important because incorporation will localize a disproportionately high share of the heretofore County sales tax that historically has been used to finance municipal services in the entire unincorporated area.

(App. 101a).

The Commission held a series of hearings on the proposed incorporation stretching over a thirteen month period. Several changes were made to the original incorporation proposal, including a change in the boundaries of the proposed new city. At the February 11, 1988 meeting, the Commission adopted Resolution No. 962B approving the Citrus Heights incorporation proposal. (App. 109a-125a). In accordance with Government Code section 57103(a), the resolution called for an election on the incorporation to be held only within the boundaries of the proposed new city. (App. 116a). Petitioner subsequently filed suit against the Commission and CHIP challenging, among other things, the constitutionality of the election statute.

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[4] As noted below, the Commission subsequently changed the boundaries of the proposed new city to exclude a tax-rich shopping mall. Nevertheless, it is undisputed that the incorporation of the City of Citrus Heights will cause a significant loss of revenue to the County. The amount of the net annual revenue loss has been estimated from $1.1 million (*see* App. 102a, 104a) (Commission staff "very rough" estimate of lost annual tax revenues after exclusion of shopping mall and other areas), to $2.5 million and above, (*see* App. 107a) (County Executive Summary estimating net annual loss to County of $2.5 million in first year of incorporation increasing to approximately $3.7 million per year after completion of phased property tax transfer).

II. COURSE OF PROCEEDINGS

This action is a petition for a writ of mandate and a complaint for injunctive relief originally brought by petitioner and by the Sacramento County Deputy Sheriff's Association and Sacramentans To Save Our Services (collectively "Plaintiffs"). Plaintiffs filed the action against respondents Commission and CHIP challenging the Commission resolution approving the creation of the new City of Citrus Heights. Plaintiffs alleged that the incorporation election statute—California Government Code Section 57103 (hereinafter "Section 57103")—violates the equal protection provisions of the United States and California constitutions. Plaintiffs sought a declaration from the trial court that Section 57103 unconstitutionally violates the equal protection of the laws. *Board of Supervisors v. Sacramento Local Agency Formation Com.*, 6 Cal.App.4th 475, 487 (1991) (App. 29a).

Respondents Commission and CHIP filed their answer to the petition and complaint, denying that Section 57103 is unconstitutional in any respect. The trial court subsequently entered its Judgment On Plaintiffs' Complaint For Declaratory Relief, Injunction, And Petition For Writ Of Mandate and denied Plaintiffs' request for a declaration that Government Code section 57103 is unconstitutional. Appendix C (App. 77a-84a). Distinguishing a California Supreme Court case holding that the strict scrutiny standard should be applied to on the constitutionality of an annexation election statute, *Citizens Against Forced Annexation v. Local Agency Formation Commission*, 32 Cal.3d 816 (1982), the trial court reasoned that strict scrutiny should not be applied because the effects of incorporations on county residents are substantially different than the effects of annexations on residents of the annexing city. (App. 83a).

Petitioner timely appealed the judgment upholding the election statute. The Third District Court of Appeal reversed the decision of the trial court, holding that Cali-

fornia Government Code section 57103 is unconstitutional as applied because the Equal Protection Clause requires the franchise to include all residents of the unincorporated region of the County. *Board of Supervisors v. Sacramento Local Agency Formation Com.*, 6 Cal.App.4th 475 (1991) (App. 27a-75a.)

The appellate court reviewed Section 57103 under the strict scrutiny standard. Following two California Supreme Court decisions—*Citizens, supra*, 32 Cal.3d 816 and *Fullerton Joint Union High School Dist. v. State Bd. of Education*, 32 Cal.3d 779 (1982)—the court of appeal held that geographic distinctions limiting the right to vote are measured under the strict scrutiny standard when the franchise is denied to otherwise qualified voters residing within the geographic boundaries of the "'"governmental entity concerned."'" *Board of Supervisors v. Sacramento Local Agency Formation Com., supra*, 6 Cal.App.4th at 510, *quoting Fullerton Joint Union High School Dist., supra*, 32 Cal.3d at 803, *quoting Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68 (1978) (App. 60a). In determining the constitutionally relevant boundaries for an incorporation election, the court observed that,

> [u]pon its incorporation, the new city is invested with municipal power over its affairs, the unincorporated territory remains under tutelage of the county but loses its confederacy with the new city, and the county relinquishes local control over the new city.

Id. at 513 (App. 65a). The court concluded that when a potential voter is subjected to "*significant effects*" of the change in local government, a voting classification which geographically excludes those persons must be strictly scrutinized.

> [W]hile it is a somewhat rubbery ruler, it is a potential voter's *substantial interest* in the change in government by being subjected to *significant effects* of the change which determines whether the residency

> line has been drawn in such a way as to result in impermissible disenfranchisement and the consequent strict scrutiny of that line.

Id. at 513-514 (emphasis in original) (App. 66a).

Turning to the facts of the case, the California Court of Appeal found that the proposed new city would be detached from the existing *de facto* municipality of the unincorporated County territory. The court explained:

> "The system of governance in the unincorporated area has evolved, for the most part, during the last 30 years. The service pattern that resulted—County provision of many essential city-type services and a multiplicity of special districts—is not the norm for urban areas around the state . . . ." . . . [¶] "[¶] The end result [has been] . . . the creation and maintenance of a pseudo-city of 550,000." . . . "[¶] The municipal services provided to the unincorporated area are of a very high standard and are comparable to the level of service received by cities of the same size and scope. . . ."

Board of Supervisors v. Sacramento Local Agency Formation Com., supra, 6 Cal.App.4th at 514-515 (first bracket added; remaining brackets in original) (citations omitted) (App. 67a-68a). Thus, "the county government in Sacramento is acting as de facto city government for the unincorporated area . . . ." *Id.* at 516 (App. 70a).

The court of appeal concluded that the proposed *de facto* detachment of territory from the unincorporated county area will cause a loss of revenues to the County and a consequent disruption in services to the residents of the unincorporated areas left behind after incorporation. *Id.* at 515-516 (App.68a-70a). Moreover, incorporation will strip the County of regulatory and financial authority over the Citrus Heights area.[5] *Id.* at 516 (App.

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[5] In California, county government is empowered with all local police powers in the unincorporated portions of the county. Cal. Const. art. XI, § 7. Within city limits, the city government exer-

69a-70a). The residents of the unincorporated region "have a substantial interest in the incorporation vote because they will be significantly affected by it." *Id.* at 517 (App. 70a). "As a result," the court held, "the limitation of the franchise by [Section 57103] to only the residents of the proposed city must be subjected to strict judicial review." *Ibid.* (App. 70a-71a). Applying the strict scrutiny standard, the Court of Appeal concluded that no compelling state interest was served by the necessary means of *denying* all unincorporated area residents the right to vote. *Id.* at 517-518 (App. 71a-73a). Accordingly, the appellate court held the statute unconstitutional.[6] *Ibid.*

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cises these powers. *Ibid.* Once a city incorporates, the county government loses its police powers within the incorporated area because the county has no legal right to legislate for the city upon any subject that is within the scope of powers granted to a municipality. *In re Knight*, 55 Cal.App. 511, 517 (1921).

[6] The following twenty-three states grant the franchise, at least in some circumstances, on the issue of municipal detachments: Alabama, (Ala. Code § 11-42-206), Alaksa, (Alaska Stat. § 29-06.040), Arizona, (Ariz. Rev. Stat. Ann. § 9-215), Arkansas, (Ark. Stat. Ann. § 14-40-1801), California, (Cal. Gov't Code § 57103(d)), Delaware, (Del. Code Ann. tit. 22, § 105), Florida, (Fla. Stat. § 171.051), Iowa, (Iowa Code § 368.8), Kentucky, (Ky. Rev. Stat. Ann. § 81A.440), Louisiana, (La. Rev. Stat. Ann. § 33:172), Maryland, (Md. Ann. Code art. 23A, § 16), Michigan, (Mich. Comp. Laws §§ 117.8, 117.9), Missouri (Mo. Rev. Stat. § 81.130) (farmlands), New Hampshire, (N.H. Rev. Stat. § 51:9), New York, (N.Y. Village Law § 18-1804 (McKinney) (village election), Ohio, (Ohio Rev. Code Ann. § 709.39 (Page) (detachment from village), Oregon, (Or. Rev. Stat. §222.460), South Carolina, (S.C. Code Ann. § 5-3-280), Tennessee, (Tenn. Code Ann. § 6-51-201), Texas, (Tex. Local Gov't Code Ann. § 43.143), Washington, (Wash. Rev. Code § 35.16.010), West Virginia, (W. Va. Code § 8-7-2), and Wisconsin, (Wis. Stat. § 66.022). Perhaps in recognition of the impacts on residents of the source territory, the states of Alabama, Arizona, Arkansas, Delaware, Maryland, Michigan, Missouri, New Hampshire, New York, Oregon, South Carolina, Texas, Washington, West Virginia, and Wisconsin (fifteen states) grant the franchise to residents of the area to be detached and the remaining territory of the municipality.

Respondents CHIP and Commission petitioned the California Supreme Court to review the decision of the intermediate appellate court. The state high court agreed to hear the case and reversed the decision of the intermediate appellate court. *Board of Supervisors v. Local Agency Formation Commission*, 3 Cal.4th 903 (1992) (App. 1a-26a).

The California Supreme Court acknowledged that Section 57103 "touches the right to vote." *Id.* at 914 (App. 11a). Nevertheless, the court declined to review the statute under the strict scrutiny standard because, the court held, Section 57103 does not have a "'"real and appreciable impact" upon the equality, fairness and integrity of the electoral process.'" *Ibid.*, *quoting Choudhry v. Free*, 17 Cal.3d 660, 664 (1976), *quoting Bullock v. Carter*, 405 U.S. 134, 144 (1972) (App. 12a). The Court reasoned that individual interests in voting are "much attenuated" by "the state's plenary power to oversee and regulate the formation of its political subdivisions" and that this plenary power enables the state "to identify as differing in degree the interests of those who may vote under section 57103 and those who may not." *Board of Supervisors*, *supra*, 3 Cal.4th at 914 (App. 12a). The California Supreme Court relied heavily upon two decisions from this Court—*Hunter v. Pittsburgh*, 207 U.S. 161 (1907) and *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977). The supreme court acknowledged, however, that neither case decided the standard of review to be applied when voters with a more "diffuse interest" in an incorporation are excluded from voting. "To our knowledge," the court explained, "the United States Supreme Court has never addressed this issue." *Board of Supervisors*, *supra*, 3 Cal.4th at 917 (App. 15a).

In deciding that the higher level of scrutiny should not be applied, the California Supreme Court declined to follow its own relatively recent decisions in *Fullerton* and *Citizens*. The California Supreme Court noted that

the decision in *Fullerton* was embodied in a plurality opinion which lacks authority as precedent. *Id.* at 918 (App. 17a), *citing inter alia Adoption of Kelsey S.*, 1 Cal.4th 816 (1992). Moreover, the state high court effectively overruled *Citizens*, to the extent the decision "is inconsistent with the constitutional principles set forth in the [present] opinion." *Id.* at 921 (App. 21a).

The court's choice of the standard of review effectively disposed of petitioner's challenge to the statute.[7] Applying the rational relationship test, the California Supreme Court concluded that Section 57103 " 'bears some fair relationship to a legitimate public purpose.' " *Id.* at 923, *quoting Plyler v. Doe*, 457 U.S. 202, 216 (1982), *rehearing denied*, 458 U.S. 1131 (1982) (App. 24a). The state's policy of encouraging "orderly development" is a legitimate interest, the court stated, and Section 57103 is fairly related to this interest "for, if large, relatively disinterested majorities could veto incorporations decided through the Cortese-Knox Act's elaborate process, the result might well hinder orderly growth and development." *Board of Supervisors, supra*, 3 Cal.4th at 923 (App. 25a). Thus, the California Supreme Court concluded, Section 57103 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 924 (App. 26a).

REASONS FOR GRANTING THE WRIT

The decision of the California Supreme Court raises an unsettled constitutional issue of national significance and is in conflict with this Court's opinion in *Carrington v. Rash*, 380 U.S. 89 (1965).

The municipal incorporation election statute in California absolutely disenfranchises a class of voters who

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[7] The court noted that if it had chosen to follow the *Citizens* case, and applied strict scrutiny, "we would now be compelled to declare section 57103 invalid on constitutional grounds." *Board of Supervisors, supra*, 3 Cal.4th at 921.

reside within the boundaries of the existing local governmental entity and have an interest in the outcome of the election. Although the state supreme court acknowledged that the statute denied the franchise to a class of otherwise qualified voters, the court scrutinized the statute using the lower standard of judicial review—the "rational relationship" test. In settling on this standard of review, the state high court failed to exhibit a high degree of confidence in the fitness of its decision. The court noted the limitations on the language from *Hunter* and expressly distinguished the decision in *Lockport*. Concluding its analysis of the standard of review, the state supreme court candidly admitted that this Court "has never addressed the issue . . . ." *Board of Supervisors v. Local Agency Formation Com.*, *supra*, 3 Cal.4th at 917.

Applying the lower standard, the supreme court held that the voting classification is "fairly related" to the state's interest in promoting "orderly growth" because inclusion of the disenfranchised class of otherwise qualified voters could result in a "veto" of the proposed incorporation. *Id.* at 923 (App. 25a). The court observed that it would be reluctant to "frustrate the endeavor of individuals" to "fix the unit of their local governance" by incorporating a new city. *Id.* at 924 (App. 25a). Because those citizens who live outside the area to be incorporated may not favor the creation of a new city, the court implicitly concluded, the state could properly exclude those persons from the franchise.

The holding of the state high court in the present case directly conflicts with the decision of this Court in *Carrington v. Rash*, *supra*, 380 U.S. 89. There, the Court held that " '[f]encing out' from the franchise a sector of [qualified voters] because of the way they may vote is constitutionally impermissible." *Id.* at 94. The fact that some residents of the County may not wish Citrus Heights to incorporate is not a legitimate reason for depriving them of the opportunity to vote on the issue. As

Carrington recognizes, denying the franchise to a group of residents on the basis of their political views "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96.

Petitioner asks this Court to grant the present writ of certiorari to settle an important point in constitutional law. "'One of the most striking and encouraging phenomena of our times has been the deep and renewed interest of citizens in local community matters.'" *Id.* at 924, *quoting Curtis v. Board of Supervisors*, 7 Cal.3d 942, 965-966 (1972) (App. 25a). In addition to California, at least thirty-one states grant some form of the franchise on the incorporation of new municipalities.[8] Thus, the importance of an individual's right to participate in a vote on a fundamental change in the nature of his or

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[8] The following states require, at least in some circumstances, a vote to approve the creation of new municipal corporations in the state: Alabama, (Ala. Code. § 11-41-3), Alaska, (Alaska Stat. § 29.05.110), Arizona, (Ariz. Rev. Stat. Ann. §§ 9-101, 9-101.02, 9-101.03), Colorado, (Colo. Rev. Stat. § 31-2-102), Illinois, (Ill. Rev. Stat., ch. 24, §§ 2-2-1, 2-2-6, 2-3-5 (incorporation of village), 2-3-5a (incorporation of village), 2-3-10 (incorporation of village), 2-3-15 (incorporation of village)), Iowa, (Iowa Code § 368.19), Louisiana, (La. Rev. Stat. Ann. § 33:3), Maryland, (Md. Ann. Code art. 23A, § 25), Massachusetts, (Mass. Const. Amend. Art. 2, § 3), Michigan, (Mich. Comp. Laws §§ 123.1010, 123.1010(a), Missouri, (Mo. Rev. Stat. §§ 72.080, 72.105), Montana, (Mont. Code Ann. § 7-2-4104), Nevada, (Nev. Rev. Stat. § 286.016), New Jersey, (N.J. Rev. Stat. §§ 40:69A-15, 40:69A-20), New Mexico, (N.M. Stat. Ann. § 3-2-6), New York, (N.Y. Village Law § 2-216 (McKinney) (incorporation of villages)), North Dakota, (N.D. Cent. Code § 40-02-06), Ohio, (Ohio Rev. Code Ann. § 707.30 (Page)), Oklahoma, (Okla. Stat. tit. 11, §§ 3-102 (incorporation of town), 4-102, 4-103), Oregon, (Or. Rev. Stat. § 221.050), Pennsylvania, (Pa. Stat. Ann. tit. 53, § 35202 (Purdon)), Rhode Island, (R.I. Const. art. 13, § 7), South Carolina, (S.C. Code Ann. § 5-1-50), South Dakota, (S.D. Codified Laws Ann. § 9-3-6), Tennessee, (Tenn. Code Ann. § 6-1-204), Texas, (Tex. Local Gov't Code Ann. §§ 7.006, 8.006), Utah, (Utah Code Ann. § 10-2-102.8), Washington, (Wash. Rev. Code § 35.02.090), West Virginia, (W. Va. Code § 8-2-6), Wisconsin, (Wis. Stat. § 66.021), and Wyoming, (Wyo. Stat. § 15-1-205).

her local community extends well beyond the lines of that particular community.

I. THE INCORPORATION ELECTION STATUTE IS PROPERLY REVIEWED UNDER THE STRICT SCRUTINY STANDARD

In *Burdick v. Takushi*, 504 U.S. —— [119 L.Ed.2d 245] (1992), this Court set forth the standard for review of state election laws.

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id., 119 L.Ed.2d at 253, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Under this standard, the level of scrutiny will depend upon the extent to which the challenged statute burdens the rights guaranteed, in this case, by the Fourteenth Amendment.

> [A]s we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." [Citation omitted.] But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. [Citation omitted.]

Burdick, supra, 119 L.Ed.2d at 253-254.

In the present case, the California Supreme Court recognized that Section 57103 touches the right of all Sacramento County citizens to vote, "for all are affected to

some degree by the proposed incorporation."[9] *Board of Supervisors v. Local Agency Formation Com.*, *supra*, 3 Cal.4th at 914 (App. 12a). Nevertheless, the court concluded that Section 57103 does not impose "severe" restrictions upon voting rights because, as the court explained,

> individual interests in voting are much attenuated by the state's plenary power to oversee and regulate the

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[9] Indeed, as the state court of appeal found, in the circumstances of this case the incorporation will have particularly harsh effects on the remaining unincorporated area residents. Pursuant to California law, the County provides residents of the unincorporated area with a variety of "municipal-type" services. (App. 92a-94a). Upon incorporation of Citrus Heights, the County will cease to provide these services to residents of the newly incorporated municipality. The new city government will assume responsibility for the provision of these services. *See* Cal. Gov't Code §§ 36501(d), 38630 (police protection); *id.* §§ 65100, 65101, 65850 (planning and land use); *id.* §§ 38601, 38660 (building inspection); *id.* § 40401(c) (road construction and public works engineering); *id.* § 38792, Cal. Food & Agr. Code § 30652 (animal control). At the same time, the County will suffer a substantial loss of tax revenue from the incorporation. And the court of appeal correctly noted that the proponents of incorporation made quite clear their intention to "capture" from the County tax revenues that are generated within the boundaries of the proposed city. *Board of Supervisors v. Sacramento Local Agency Formation Com.*, *supra*, 6 Cal.App.4th at 515-516 (App. 69a). As stated in footnote 4, *ante*, the actual amount of net loss was estimated at anywhere from $1.1 million to $3.7 million per annum—in 1986 dollars. The loss of revenue to the County will cause a precipitous drop in the level of the municipal services provided to the remaining unincorporated area residents. (App. 91a) (exclusion of Citrus Heights area from County tax base "would likely diminish the overall levels of public services provided by the County to the remaining unincorporated areas, thus creating a burden and hardship for residents of those areas"). As Respondent Commission noted in its feasibility study:

> This [loss of revenues to County] is a key finding and indicates that the incorporation of Citrus Heights could have a potentially detrimental effect on Sacramento County operations and the delivery of services to the remainder of the unincorporated area.

(App. 98a) (emphasis omitted).

> formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under section 57103 and those who may not.

Ibid. (App. 12a). Accordingly, the court applied the lower standard of review—the "rational relationship" test—in upholding Section 57103. *Id.* at 921, 923-924 (App. 22a, 24a-26a).

The decision of the California Supreme Court as written rests fundamentally upon a policy choice—the power of the state to regulate the creation of its political subdivisions outweighs the individual's right to vote. As the court stated, "we conclude the *essence* of this case is not the fundamental right to vote, but state's plenary power to set the conditions under which its political subdivisions are created." *Id.* at 917 (App. 16a) (emphasis added). Notwithstanding the state high court's decision, the premise of the court's choice—the "plenary" power of the state—rests upon a misreading of this Court's decisions.

A. States Do Not Have Unfettered Plenary Power Over The Creation Of Their Political Subdivisions

The California Supreme Court relied heavily upon the decision of this Court in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). In *Hunter*, residents of the city of Allegheny—a suburb of the larger city of Pittsburgh—brought a writ of error challenging a Pennsylvania law authorizing consolidation of the two cities "if upon an election the majority of the votes cast in the territory comprised within the limits of both cities favor the consolidation[.]" *Id.* at 174. Among the assignment of errors, plaintiffs alleged that the state law allowed the electors of the larger city to "overpower" those electors of the smaller city and therefore authorized the consolidation without the vote or consent of a majority of the qualified electors of the smaller city. *Id.* at 168, 177. The California Supreme Court read this assignment of error as an equal protection challenge brought on voting-rights grounds.

Board of Supervisors v. Local Agency Formation Com., *supra*, 3 Cal.4th at 915 (App. 13a).[10] The *Hunter* Court read the assignment far differently.

> [T]he assertion in the fourth assignment of error is that the Act of Assembly *deprives the plaintiffs in error of their property without due process of law*, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process of law has been violated, as set forth in the first assignment of error and insisted upon in argument, is that the method of voting on the consolidation prescribed in the act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest.

Id. at 177 (emphasis added). Noting that municipal corporations are mere political subdivisions of the state, this Court rejected the due process challenge. "Neither their charters, nor any law conferring governmental powers, . . . constitutes a contract within the meaning of the Federal Constitution." *Id.* at 178.

In language relied upon by the state high court in the present case, this Court declared that "[t]he State . . .

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[10] In its opinion, the California Supreme Court quotes from the "First Assignment Of Error" in *Hunter* to identify the issue decided there by this Court. *Compare Board of Supervisors v. Local Agency Formation Com.*, *supra*, 3 Cal.4th at 915, *with Hunter*, *supra*, 207 U.S. at 168. However, the California Supreme Court quotes only a select part of the grounds alleged for this error. As stated in *Hunter*, plaintiffs challenged the statute "[as] in violation of the law of the land, it being unfair, unjust and unequal; and [as] in conflict with the rights and privileges reserved by the people to themselves . . . ." *Hunter*, *supra*, 207 U.S. at 168 (internal quotation marks omitted). Most important, the California Supreme Court failed to recognize that this Court in *Hunter* summarily rejected the First Assignment of Error. *See id.* at 176 ("We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration . . . ."). The language of *Hunter* which the California Supreme Court relies upon in the instant case actually concerns the Fourth Assignment Error—the due process challenge. *Id.* at 177-179.

at its pleasure may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation." The state may undertake these changes "conditionally or unconditionally, with or without the consent of the citizens, or even against their protest." The Court concluded, "[i]n all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." *Id.* at 178-179.

The California Supreme Court relied heavily upon this portion of the opinion, although, as the court observed, subsequent cases have recognized the broad language of *Hunter* must necessarily be qualified " 'by a state's fundamental constitutional obligation to avoid racial or other invidious discrimination . . . .' " *Board of Supervisors v. Local Agency Formation Com.*, *supra*, 3 Cal.4th at 915, *quoting Fullerton Joint Union High School Dist. v. State Bd. of Education*, *supra*, 32 Cal.3d at 810 (Kaus, J., conc. & dissenting) (App. 14a). Even acknowledging this limitation on the language of *Hunter*, the California Supreme Court concluded that the states retain nearly plenary power in creating their political subdivisions. 3 Cal.4th at 915-916 (App. 14a).

The degree of reliance which the state high court placed upon the language in *Hunter* was misplaced. While there is no doubt that the states retain wide latitude in this realm, *cf. Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 270-271 (1984) (Rehnquist, J. dissenting) (federal statute providing for payments of federal funds in lieu of taxes to counties cannot interfere with the power of the states to regulate manner in which funds are used), the limitations placed upon this power extend further than the duty to avoid racial discrimination as stated in the California Supreme Court opinion. The states' power to create and destroy municipalities is qualified by a citizen's fundamental right to vote as pro-

tected by the Due Process Clause of the Fourteenth Amendment.

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court considered the constitutional significance of the *Hunter* decision in the context of a change in municipal boundaries.

> Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is *not* that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained *by the particular prohibitions of the Constitution considered in those cases.*

Id. at 343-344 (emphasis added). A unanimous Court recognized that the *Hunter* case holds only the following: (1) "there is no implied contract between a city and its residents that their taxes will be spent solely for the benefit of that city," and (2) "a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another." *Id.* at 342-343.

After reviewing several decisions which imposed limitations upon the state's power over its municipalities,[11] this Court concluded that the state is not omnipotent in this area.

> This line of authority conclusively shows that the Court has never acknowledged that the States have

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[11] *Shapleigh v. San Angelo*, 167 U.S. 646 (1897), *Mobile v. Watson*, 116 U.S. 289 (1886), and *Broughton v. Pensacola*, 93 U.S. 266 (1876).

> power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.

Id. at 344-345; *accord*, *Hayward v. Clay*, 573 F.2d 187, 190 (4th Cir. 1978), *cert. denied*, 493 U.S. 959 (1978) (state's power over municipal corporations subject to constitutional limitations of Equal Protection Clause).

More recently, this Court considered the significance of *Hunter* in *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978). Again, this Court noted the limitations on the broad language of *Hunter*.

> While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer v. Union Free School Dist.* . . ., we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.

Id. at 71.[12] The reference to the *Kramer* decision is instructive because the Court there invalidated a voting scheme for local school district elections on the ground that restriction of the franchise to certain classes of property owners and to parents of children attending district schools[13] violated the Equal Protection Clause. *Kramer*

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[12] It is important to note that the Court in *Holt* did *not* rely upon the *Hunter* decision in deciding the appropriate standard of review in an equal protection challenge. The decision was cited in support of the Court's decision that the state statute actually bore a "rational relationship to a legitimate state purpose." *Id.* at 70-71.

[13] The state statute allowed otherwise qualified school district residents the right to vote in the school district elections only if they either (1) owned or leased taxable real property in the district, (2) were married to an owner or lessee of such real property, or (3) were a parent or guardian of a child enrolled in the local

v. Union Free School District, 395 U.S. 621, 632-633 (1969).

The decisions of this Court recognize that the individual's right to vote does not evaporate in light of the states' power over their political subdivisions. Constitutionally, the continuing significance of the *Hunter* decision is drawn into focus by the voting rights cases of the past three decades. A state does retain the unfettered right to create, alter, or abolish its political subdivisions without submitting the issue to a vote. *Cf. Sailors v. Board of Education*, 387 U.S. 105, 108-111 (1967) (appointment of local agency officials does not violate equal protection principles). Once the franchise has been granted, however, the electoral process is subject to the strictures of the Equal Protection Clause. *McDonald v. Board of Election*, 394 U.S. 802, 807 (1968). "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966); *see, e.g., Phoenix v. Kolodziejski*, 339 U.S. 204, 205, 212-213 (1970) (Equal Protection Clause precludes a state from restricting electorate to real property taxpayers in general obligation bond elections); *Cipriano v. City of Houma*, 395 U.S. 701, 702, 706 (1969) (Equal Protection Clause precludes a state from restricting electorate to property taxpayers in municipal utility bond elections). In the present case, Section 57103 grants the franchise to certain members of the electorate; accordingly, the lines drawn must be consistent with the Equal Protection Clause.

B. A Classification That Completely Disenfranchises A Class Of Qualified And Interested Voters Should Be Strictly Scrutinized

The California Supreme Court also relied heavily upon the decision of this Court in *Lockport v. Citizens for*

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school district. *Kramer v. Union Free School District*, 395 U.S. 621, 623 (1969).

Community Action, 430 U.S. 259 (1977). In that case, a New York law provided that new county charters will become effective only if approved in a referendum election by separate majorities of city and non-city voters. The county charter generally affected the allocation of general governmental powers exercised by the county and by cities, villages, and towns located within the county. A new charter for the County of Niagara was put to referendum. The city voters approved the charter by about 2,100 votes; however, the non-city voters defeated the measure by less than 200 votes. Thus, the new charter was rejected even though a majority of the total votes cast favored it. *Id.* at 260-263, 263 n.6. A group of the city voters challenged the concurrent majority voting scheme on equal protection grounds. *Ibid.*

This Court initially noted that the equal protection principles applicable to representative elections "are of limited relevance" in analyzing the constitutionality of voter classifications in a "single-shot" referendum election.[14] *Id.* at

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[14] The Court noted two separate lines of relevant cases. In the first, the Court "has held that the electorate of a special-purpose unit of government, such as a water storage district, may be apportioned to give greater influence to the constitutent groups found to be most affected by the governmental unit's functions." *Lockport, supra*, 430 U.S. at 266, *citing Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973); *see, e.g., Ball v. James*, 451 U.S. 355 (1981); *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973). This line of cases is not applicable to the present case because, among other reasons, the proposed City of Citrus Heights is obviously not a "special limited purpose" unit of local government. *Cf. Salyer, supra*, 410 U.S. at 728. The second line of cases cited in *Lockport*—*Cipriano v. City of Houma*, 395 U.S. 701 (1969), *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Hill v. Stone*, 421 U.S. 289 (1975), *rehearing denied*, 422 U.S. 1029 (1975)—are "bond referenda" cases relevant to the issue before this Court. As noted in *Lockport*, this Court in the latter cases held that voting schemes which exclude otherwise qualified electors having an "identity of interest" or a "sufficiently similar" interest in the election must be reviewed under the strict scrutiny standard. *Lockport, supra*, 430 U.S. at 267-268. These "bond referenda" cases properly anchor the Court's equal protection analysis here.

266. The Court then formulated two "inquiries" to determine the appropriate level of scrutiny.

> [W]hether there is a genuine difference in the relevant interests of the groups that the state electoral classification has created; and if so, whether any resulting enhancement of minority voting strength nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause.

Id. at 268. Reviewing the challenged statute in the context of local government powers in New York, the Court concluded that the statute merely recognized different constituencies with separate and potentially opposing interests. *Id.* at 268-269, 271. As the Court explained:

> [S]eparate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. *Voters in these constituent units are directly and differentially affected by the restructuring of county government,* which may make the provider of public services more remote and less subject to the voters' individual influence. [¶] *The provisions of New York law herein question no more than recognize the realities of these substantially differing electoral interests.*

Id. at 271-272 (emphasis added). Noting that the voting scheme did not invidiously discriminate against a particular class, *id.* at 272 n.18, the Court upheld the statute under the rational relationship test. *Id.* at 272-273.

Contrary to the decision of the California Supreme Court, the decision in *Lockport* is properly distinguished from the present case. Initially, as the California Supreme Court recognized, "*Lockport* did not decide what standard . . . applies when voters with a more diffuse interest in an incorporation are *excluded* from voting . . . ." *Board of Supervisors v. Local Agency Formation Com.*,

supra, 3 Cal.4th at 917 (emphasis added) (App. 15a). Unlike the voting statute in *Lockport*, Section 57103 does not "recognize" the interests of "differentially affected" voters. *Lockport*, *supra*, 430 U.S. at 272. Even *if* residents of the area proposed to be incorporated have a less "diffuse" interest in the "election,"[15] Section 57103 fails to recognize the electoral interests of the remaining County area residents *at all*. Given that the disenfranchised are residents of the existing "governmental unit concerned," [16] the decision of the California Supreme Court to apply the rational basis test defies logic because the voting scheme denies the franchise—completely and absolutely—to a class of qualified voters with a substantial interest in the outcome of the election.

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[15] Petitioner in no way concedes this point. As the state court of appeal found, the proposed incorporation will effectively detach the new city from the *de facto* city of unincorporated territory within the County. *See Board of Supervisors v. Sacramento Local Agency Formation Com.*, *supra*, 6 Cal.App.4th at 514-516, 518-519 (App. 66a-70a, 73a). Up to $3.7 million per year of tax revenue will be lost by the County after the incorporation. In large part, the revenues will simply be transferred from the County to the coffers of the new city. Most important, the residents of the new city will not bear *any* of the costs of the incorporation. As the Feasibility Analysis of the Commission makes clear, residents of the proposed city will not incur any additional taxes to finance the incorporation. (App. 99a; *see* App. 100a (no property tax increase related to incorporation)). In contrast, the disenfranchised unincorporated area residents will likely see an increase in taxes, a decline in their municipal type services, or both. No less than in *Phoenix* and *Cipriano*, the disenfranchised here have a significant interest in the level of important government services and the costs of providing them. *See Phoenix v. Kolodziejski*, *supra*, 399 U.S. at 205-206, 209-210 (election to approve general obligation bonds for municipal improvements); *Cipriano v. City of Houma*, *supra*, 395 U.S. at 705 (election to approve utility revenue bonds). When qualified voters "have substantially identical interests . . ., regardless of where they reside in the county," an election statute excluding a class of those voters must be strictly scrutinized. *Lockport*, *supra*, 430 U.S. at 268.

[16] *Holt Civic Club v. City of Tuscaloosa*, *supra*, 439 U.S. at 68.

While no decision from this Court has directly addressed this issue, the reasoning of *Lockport* certainly suggests that a distinction should be drawn between voting statutes that recognize differing interests by weighing classes of votes and those that completely disenfranchise interested persons.[17] In support of its decision, the Court analogized the New York county charter election law to annexation and consolidation election statutes. In drawing its analogy, the Court carefully prescribed separate "voter approval in each constituent [unit]." *Lockport*, *supra*, 430 U.S. at 259. Conspicuously absent in the Court's discussion is any reference to a classification completely abridging the right to vote.[18]

In a different context, the contrasting decisions of this Court in *Rosario v. Rockefeller*, 410 U.S. 752 (1972), *rehearing denied*, 411 U.S. 959 (1973) and *Kusper v. Pontikes*, 414 U.S. 51 (1973), strongly suggest that absolute disenfranchisement is far more pernicious constitutionally than other types of restrictions or limitations on the right to vote. In *Rosario*, a state election statute allowed only members of a political party to participate in that party's primary. To vote in a primary election, the statute required the voter to register as a party member

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[17] As *Lockport* illustrates, non-discriminatory, weighted voting schemes generally pass constitutional muster. In *Gordon v. Lance*, 403 U.S. 1 (1970), for example, this Court reviewed West Virginia laws that precluded political subdivisions of the State from incurring bonded indebtedness or increasing tax rates without the approval of 60% of the voters. *Id.* at 2. In effect, the "no" votes were weighed 1.5 times as heavy as the "yes" votes. The Court readily conceded that the voting scheme was a "departure from strict majority rule [and] gives disproportionate power to the minority." *Id.* at 6. Nevertheless, the Court concluded, because the laws did not discriminate against an "independently identifiable" voter class the Equal Protection Clause was not violated. *Id.* at 5, 7-8.

[18] Importantly, nothing in *Lockport* suggests or implies that the individual right to vote in local referendum elections is "attenuated" or displaced by the state's power over its political subdivisions. *See Lockport*, *supra*, 430 U.S. at 265-268.

at least 30 days prior to the general election for that year. *Id.* at 753. The Court observed that, under the election statute, an individual voter may vote in a different party primary each year. Thus, the statute did not "lock" a voter into an unwanted party affiliation in any particular primary election year. *Id.* at 759. Reasoning that the classification "did not absolutely disenfranchise" a class of voters, *id.* at 757, the Court upheld the statute in the face of an equal protection challenge.[19] *Id.* at 756-757, 762; *cf. Kusper v. Pontikes*, *supra*, 414 U.S. at 57, 58-59 (Court strictly scrutinized state primary election statute that "lock[ed]" the voter into a pre-existing party affiliation for substantial time period and therefore "absolutely precluded" plaintiff from voting in a party's primary election).

For many years now, this Court has recognized that "'the political franchise of voting' [is] a 'fundamental political right, because preservative of all rights.'" *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), *quoted in Harper v. Board of Elections*, *supra*, 383 U.S. at 667. Thus,

> if a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest."

Cipriano v. City of Houma, *supra*, 395 U.S. at 704 (citation omitted). Petitioner here asks this Court to recognize that a municipal incorporation election statute absolutely precluding a class of qualified and interested persons from voting violates the equal protection of the

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[19] As the dissenting opinion of Justice Powell notes, the decision of the Court does not precisely identify the standard of scrutiny applied. *Rosario v. Rockefeller*, *supra*, 410 U.S. at 767 (Powell, J., dissenting). "The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection 'rational basis' test." *Id.*

laws unless the classification "is narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, *supra*, 119 L.Ed.2d at 253 (internal quotations omitted).

II. SECTION 57103 IMPERMISSIBLY "FENCES OUT" A CLASS OF VOTERS BECAUSE OF THE WAY THEY MAY VOTE

In *Carrington v. Rash*, *supra*, 380 U.S. 89, plaintiff challenged on equal protection grounds a provision of the Texas Constitution which prohibited any member of the Armed Forced of the United States who moves to Texas during his military duty "from ever voting in any election in that State 'so long as he or she is a member of the Armed Forces.' " *Id.* at 89, quoting Tex. Const. art. VI, § 2. Formulating its standard of review, this Court asked " 'whether the classifications drawn in a statute are reasonable in light of its purpose . . . .' " *Carrington*, *supra*, 380 U.S. at 93, *quoting McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Turning to the purposes of the classification, the Court first examined the state's purported "legitimate interest" in "immunizing" its electoral process "from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community." *Carrington*, *supra*, 380 U.S. at 93. In an oft-quoted passage, the Court held that the state cannot have a legitimate "interest" in excluding persons on the basis of the way they may vote.

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions," [citation], cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

Id. at 94. This Court concluded that the exclusion of military personnel from the franchise constitutes "an invidious discrimination in violation of the Fourteenth

Amendment." *Id.* at 96; *see Dunn v. Blumstein*, 405 U.S. 330, 354-356 (1971) (states may not impose durational residence voting requirements "to impress upon its voters the local viewpoint" because excluding persons on the basis of "'[d]ifferences of opinion'" is a "'constitutionally impermissible reason'" for denying the vote) (citations omitted); *cf. Gordon v. Lance*, 403 U.S. 1, 5 (1971).[20]

In the present case, the California Supreme Court ruled that Section 57103 fairly serves a legitimate state purpose "for if large, relatively disinterested majorities could *veto* incorporations," the state's interest in "orderly growth and development" could be thwarted. *Board of Supervisors v. Local Agency Formation Com., supra*, 3 Cal.4th at 923 (emphasis added) (App. 24a-25a). In other words, the state may "fence out" a class of otherwise qualified electors from voting on incorporation simply because they may have a difference of opinion on the issue. This is precisely the type of invidious discrimination that *Lockport*, *Carrington*, and *Dunn*, among other cases, proscribe.

In *Evans v. Cornman*, 398 U.S. 419 (1969), this Court observed that "all too often, lack of a 'substantial interest' might mean no more than a different interest" that is "'"fenc[ed] out" from the franchise'" because of their differing political opinions. *Id.* at 423, *quoting Carrington*, *supra*, 380 U.S. at 94. Here, the California Supreme Court paid no heed to this Court's warning and upheld a voting statute that excludes a class solely be-

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[20] The Court in *Lockport* noted that even if the electoral classification merely recognizes a "genuine difference" in relevant interests, "invidious[ly] discriminat[ory]" voting statutes will be struck down. *Lockport*, *supra*, 430 U.S. at 268; *see also id.* at 272, n.18 ("no indication that the classifications . . . work to favor city voter over town voter, or town voter over city voter"). As *Carrington* and its progeny make clear, "fencing out" a class of voters on the basis of the way they vote constitutes invidious discrimination of the worst order.

cause of the way they may be expected to vote. Under any standard of review, therefore, the statute fails to serve a constitutionally permissible purpose and should be struck down as invidious discrimination in violation of the equal protection of the laws.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to review the judgment of the California Supreme Court.

Respectfully submitted,

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February 5, 1993

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S023805

Ct.App. C006792

Sacramento County
Super.Ct. No. 358798

BOARD OF SUPERVISORS OF SACRAMENTO COUNTY *et al.*,
Plaintiffs and Appellants,
v.

SACRAMENTO LOCAL AGENCY FORMATION COMMISSION,
Defendant and Appellant;

CITRUS HEIGHTS INCORPORATION PROJECT,
Real Party In Interest and Appellant.

[Filed November 9, 1992]

Residents of an unincorporated area of Sacramento County seek to incorporate into a city. Government Code section 57103 provides that only the voters residing in the territory to be incorporated may vote to confirm the incorporation. The Court of Appeal found this law unconstitutional as applied, holding that it violates the guaranty of equal protection of the laws. We conclude that the law is constitutional, both on its face and as applied to the incorporation at issue.

The case before us illustrates the tension between California's financially beleaguered counties and the desire of residents of unincorporated areas to form cities and draw

local government closer to home.[1] With the fall in tax rates following the adoption of Proposition 13 (Cal. Const., art. XIIIA) in 1978, and a concomitant population-driven rise in demand for services, this tension has grown in recent years: at least one California county has considered bankruptcy and, like the state itself, all counties have had to make painful spending decisions. The counties fear that if tax-rich districts form cities, the counties will be deprived of revenue and their financial position further weakened. (See *Arrival of New Cities Puts Counties on a Starvation Diet*, L.A. Times (Orange Co. ed., Feb. 17, 1991) Metro sec., pt. B, p. 8, col. 1.) On the other hand, community residents and landowners often prefer to govern their local affairs insofar as possible, and cityhood provides them with greater opportunities for self-determination than does residence or ownership in a more amorphous unincorporated area. The evolution of cities is a natural process when population grows and communities begin to form their own identities.

Acknowledging the tension between fiscal concerns and the desire for self-government, the Legislature enacted the Cortese-Knox Local Government Reorganization Act of 1985.[2] The Cortese-Knox Act consolidated three major laws governing local-government boundary changes. As explained in *Fallbrook Sanitary Dist.* v. *San Diego Local Agency Formation Com.* (1989) 208 Cal.App.3d 753, 758, "In 1985, the Legislature repealed the Knox-Nisbet Act (former § 54773 et seq.), the District Reorganization Act

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[1] California's 58 counties contained 456 incorporated cities on November 30, 1991. (Hornor, Cal. Cities, Towns & Counties (1992 ed.) p. vii, hereafter Hornor.) "Between the passage of Proposition 13 in 1978 and July 1, 1988, 32 cities were incorporated in California, nearly twice the number incorporated in the previous decade." (Assem. Off. of Research, California 2000: Getting Ahead of the Growth Curve (Dec. 1989) p. 12.)

[2] Government Code section 56000 et seq., hereafter the Cortese-Knox Act or act. Unlabeled section references are to the Government Code.

of 1965 (former § 56000 et seq.) and the Municipal Organization Act of 1977 (former § 35000 et seq.), and replaced these laws with the Cortese-Knox Act . . . ." The new scheme's provisions became operative January 1, 1986. (*Ibid.*)

In 1986 persons in the unincorporated Sacramento County community of Citrus Heights, containing a population of approximately 69,000, collected enough valid signatures to qualify an incorporation petition to the Sacramento County Local Agency Formation Commission (commission), which by law supervises municipal incorporations in the county. Following an environmental review and other proceedings, the commission declared that the law did not require an environmental impact report and approved a resolution setting forth the incorporation proposal. The resolution contained a provision designed to mitigate the financial impact on the county: the proposed city limits were relocated to exclude a sales tax-rich shopping center. Requests for reconsideration of that resolution followed, in part on the ground that the boundaries still unfairly impacted the county's tax base. The commission adopted a new resolution that moved another shopping center outside the proposed city limits, and then, to further mitigate the county's financial loss, amended that resolution to require that the new city's receipt of property taxes be phased in more slowly. In accordance with section 57103, the commission ordered a confirming election to be held only within the territory of the proposed city.[3]

This lawsuit followed. Plaintiffs include the Sacramento County Board of Supervisors, the Sacramento County

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[3] As relevant here, section 57103 provides:

"In any resolution ordering a change of organization or reorganization subject to the confirmation of the voters, the conducting authority shall call an election:

"(a) Within the territory of each city or district ordered to be incorporated, formed, disincorporated, dissolved, or consolidated."

Deputy Sheriffs' Association, and Sacramentans to Save Our Services. The latter party alleged that it is an unincorporated umbrella organization of some 40 social and community service, labor, law enforcement, and business organizations, many of which receive county funds. Displeased, among other things, with the law's limitation of the confirming election to the voters in the territory to be incorporated, plaintiffs challenged the limitation's constitutionality on the ground that section 57103 denies them equal protection of the laws. (U.S. Const., Amend. XIV, § 1; Cal. Const., art. 1, § 7.)

At a hearing on plaintiffs' petition for writ of mandate and complaint for injunctive and declaratory relief, the court entered judgment in plaintiffs' favor on certain environmental impact issues but refused to find the voting limitation in the act unconstitutional.

The Court of Appeal affirmed the judgment on the environmental impact issues, but reversed on the constitutional question. Relying on language in the companion cases of *Fullerton Joint Union High School Dist.* v. *State Bd. of Education* (1982) 32 Cal.3d 779, 805 (*Fullerton*), and *Citizens Against Forced Annexation* v. *Local Agency Formation Com.* (1982) 32 Cal.3d 816, 826 (*Citizens*), the Court of Appeal adopted a standard it conceded to be "a somewhat rubbery ruler": i.e., that "it is a potential voter's *substantial interest* in the change in government by being subjected to *significant effects* of the change which determines whether the residency line has been drawn in such a way as to result in impermissible disenfranchisement and the consequent strict scrutiny of that line." The court decided that the county's electorate had a substantial interest in the incorporation because, given the high level of local government services the county provides in its heavily populated unincorporated area, the incorporation of Citrus Heights would generate significant effects. The court quoted another source that described the unincorporated area as " 'a pseudo-city of

550,000' " that contains almost two-thirds of all county residents and offers " 'municipal services . . . of a very high standard . . . comparable to the level of service received by cities of the same size . . . . The Sheriff's and Public Works Departments may be the largest in the state and offer very sophistica[t]ed services.' " For that reason, the court implied, the incorporation of Citrus Heights would be tantamount to a secession from Sacramento County. The court concluded that section 57103 is unconstitutional as applied to the proposed incorporation because it deprives other voters in the county's unincorporated areas of the right to vote on the question and thereby violates the equal protection clause.

The Court of Appeal fairly interpreted *Fullerton* and *Citizens*. As we shall explain, however, those cases do not mandate a conclusion that section 57103 is unconstitutional.

I.

The Cortese-Knox Act requires that every unconsolidated county have a local agency formation commission (see § 56325), appointed by local lawmaking bodies (*ibid.*), to "review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization . . . ." (§ 56375, subd. (a).) A change of organization includes the incorporation of a city with at least 500 registered voters from unincorporated county land. (§§ 56021, subd. (a), 56043.) Territory to be incorporated as a city must be located in one county. (§ 56110.)

A local agency formation commission ordinarily is a five-member body that includes two county representatives from the board of supervisors (board), two city representatives "each of whom shall be a city officer" (defined in § 56025 as a mayor of city council member), and one member of the general public chosen by the other

four. (§ 56325.) The panel must be enlarged to include two representatives of special districts if the commission of any county (1) orders special districts to be represented thereon and (2) adopts regulations affecting the "functions and services" of such districts. (§ 56332, subd. (a).)

The act, however, prescribes special treatment for almost one-third of California's 58 counties. The Legislature has created exceptions for four larger counties (§§ 56326-56328): Los Angeles, Santa Clara, San Diego, and, of significance to this case, Sacramento. "In Sacramento County, the commission shall consist of seven members, selected as follows": two board members representing the county; a representative for the city of Sacramento "who is a member of the city council, appointed by the mayor and confirmed by the city council"; a representative for the cities in the county "who is a city officer appointed by the city selection committee"; "[t]wo representing special districts selected by an independent special district selection committee"; and a member of the general public appointed by the other six. (§ 56326.5.)

For reasons we will discuss below, we find it noteworthy that although the four counties that sections 56326 to 56328 except from the general rules are populous, other heavily populated counties, such as Alameda (1990 population 1,279,182) and Orange (1990 population 2,410,556) receive no special treatment.

There are still other exceptions. In counties containing no incorporated city [4] the commission must have five members, including three from the board and two from the general public appointed by the first three.

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[4] Currently Alpine, Mariposa, and Trinity. (Hornor, *supra*, at pp. 460-462.)

(§ 56329.) In those counties containing but one city,[5] the commission is also a five-member body: two from the board, one a city officer from the lone city, and two members of the general public appointed by the first three. (§ 56330.)

Either a public petition or an affected local agency's legislative resolution is required to request a change of organization. (§§ 56650, 56800.) As a practical matter, an incorporation request will ordinarily be by petition, because it is difficult to imagine a local government entity seeking the creation of a rival for tax revenues.

The commission cannot act on an incorporation petition unless signed by not less than 25 percent of the registered voters residing in the territory of the proposed city or by not less than 25 percent of the landowners, which latter group must also own not less than 25 percent of the assessed land value. (§ 56750.) To be valid an incorporation petition in Sacramento County must satisfy nine different descriptive criteria (§ 56700), and all signatures must be gathered in six months (§ 56705, subd. (a)).

Only after these hurdles have been surmounted does the commission have the power to approve or disapprove an incorporation in whole or in part. But the Cortese-Knox Act does not give the commission carte blanche to approve incorporations. Its discretion is limited by requirements, among others, that the incorporation be consistent with the act's intent; that the commission have reviewed the comprehensive fiscal analysis prepared under section 56833.1,[6] the Controller's report prepared

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[5] Currently Calaveras (Angels Camp), Del Norte (Crescent City), Inyo (Bishop), Lassen (Susanville), Modoc (Alturas), Mono (Mammoth Lakes), Plumas (Portola), Sierra (Loyalton), and Tuolomne (Sonora). (Hornor, *supra*, at pp. 460-462.)

[6] The comprehensive fiscal analysis must describe at a minimum (§ 56833.1, subd. (d)) the proposed city's revenues and expenses

under section 56833.3, the report of the commission executive officer (an individual defined in § 56038), and the testimony presented at a public hearing; and that the proposed city likely will be fiscally sound for three fiscal years following its incorporation (§ 56375.1).

The commission cannot ratify an incorporation petition without a public hearing. (§§ 56836, subd. (b), 56069, 56021, subd. (a).) The county is given notice of the hearing (§ 56835, subd. (e)), and its presence is assured in any event because of the law's requirement that board members serve on the commission. In reviewing an incorporation proposal, the commission is required to consider a multitude of factors.[7] An incorporation proposal also triggers an elaborate inquiry into the reapportionment of property tax revenues. (§ 56842.)

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during the three fiscal years following incorporation (*id.*, subds. (a), (b)), and the fiscal effects on "any affected local agency," including the county (see §§ 56014, 56054), during that time (§ 56833.1, subd. (c)). At the request of an "interested party" (not defined in the act, but apparently any "person," see § 56833.3, subd. (d)) the Controller must review the analysis (*id.*, subd. (a)).

[7] These include but are not limited to:

"(a) Population, population density; land area and land use; per capita assessed valuation; topography [and] natural boundaries . . . ; proximity to other populated areas; the likelihood of significant growth in the area, and in adjacent incorporated and unincorporated areas, during the next 10 years.

"(b) . . . [T]he present cost and adequacy of governmental services . . . ; probable future needs for those services . . . .

". . . . . .

"(c) The effect of the proposed action . . . on adjacent areas, on mutual social and economic interests, and on the local governmental structure of the county.

". . . . . .

"(g) Consistency with city or county general and specific plans.

". . . . . .

"(i) The comments of any affected local agency [including a city or county: see §§ 56014, 56054]." (§ 56841.)

The commission may make its approval conditional on a virtually limitless array of factors (see § 56844, subd. (v)), which are set forth in detail in sections 56843 and 56844.[8] Finally, if the commission abuses its discretion by making a determination not supported by substantial evidence in light of the whole record, the courts may invalidate its decision. (§ 56107.)

After the commission has completed its inquiry and issued a resolution approving or disapproving the proposal (see §§ 56851-56852), a county, or others affected by the decision, may request reconsideration (§ 56857, subd. (a)). Several such requests were made in this case, and, as noted above, the commission acted on them (see § 56858), modifying its resolutions to mitigate the impact of the incorporation of Citrus Heights on the county's finances.

Once the commission has issued its final resolution, the matter is in the hands of the "conducting authority," which in this case is the Sacramento County Board of Supervisors (§ 56029, subd. (d)(1)). The board must conduct a public hearing on the proposal. (§§ 57025, subd. (a), 57050.) If more than 50 percent of the voters in the territory to be incorporated protest the incorporation, the board must end the proceedings. (§§ 57077, subd. (a)(1), 57078, subd. (b); see § 56043.) Otherwise it must order the incorporation, subject to the voters' "confirmation." (§ 57077, subd. (a)(2); see also §§ 57133, subd. (a), 57137 [form of question].)

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[8] These include reimbursements for the acquisition or use of public property (§ 56844, subd. (a)), apportionment of bond obligations between the county and the proposed city (*id.*, subd. (c)), the incurring of new debt (*id.*, subd. (f)), property transfers (*id.*, subd. (h)), employee discharges and modification or termination of employment contracts (*id.*, subd. (*l*)), and the transfer of authority and responsibility among any affected cities and counties for the administration of special tax and special assessment districts (*id.*, subd. (u)).

As the foregoing recitation reveals, the voters' role under the Cortese-Knox Act in confirming an incorporation is rather like that of the masons who place a keystone at the apex of a high and intricate arch. The voters' approval is an essential piece, but as we have shown, by the time the question reaches the electorate the incorporation proposal will already have undergone a labyrinthine process containing elaborate safeguards designed to protect the political and economic interests of affected local governments, residents, and landowners.

II.

As noted above, the Court of Appeal held section 57103 unconstitutional as applied to the proposed incorporation of Citrus Heights because it deprives other voters in Sacramento County's unincorporated areas of a vote on the question and thereby violates the equal protection clause. We begin our discussion of the statute's constitutionality by examining first its facial validity under federal and California precedent and then its validity, under the principles distilled from that precedent, as applied to the electorate of Sacramento County. We undertake the facial review first because if the law is unconstitutional as violating the equal protection clause on its face, and hence incapable of any valid application, there is no need to consider its application to the incorporation in question. (See generally *Quinn* v. *Millsap* (1989) 491 U.S. 95.) On the other hand, if the law on its face survives an equal protection challenge, our inquiry does not end until we decide whether the law must still be condemned as applied. (See *Milwaukee County Pavers Ass'n* v. *Fiedler* (7th Cir. 1991) 922 F.2d 419, 423.)

Not all statutes classify, but many do, and whenever the classification is challenged under the equal protection clause, we must decide its validity under one of the standards of deference required of us. (See *Nordlinger* v. *Hahn* (1992) 505 U.S. —— [120 L.Ed.2d 1, 12].)

When a law impinges on certain fundamental rights—and the right to vote may be the most fundamental of all (*Wesberry* v. *Sanders* (1964) 376 U.S. 1, 17; see also Cal. Const., art. 2, § 2)—it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. (*Plyler* v. *Doe* (1982) 457 U.S. 202, 217; *In re Griffiths* (1973) 413 U.S. 717, 721-722; *Bernal* v. *Fainter* (1984) 467 U.S. 216, 219, 227; see also *International Paper* v. *Inhabitants of Town of Jay* (D.Me. 1990) 736 F.Supp. 359, 363, affd. (1st Cir. 1991) 928 F.2d 480; *Huynh* v. *Carlucci* (D.D.C. 1988) 679 F.Supp. 61, 66.)

For most legislation, however, a court will apply the rational basis test. The "standard formulation of the test for minimum rationality" (Tribe, American Constitutional Law (2d ed. 1988) § 16-3, p. 1444, fn. 10, hereafter Tribe) is whether the classification is "rationally related to a legitimate governmental purpose." (*Cleburne* v. *Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 446.) Put another way, the classification must bear some fair relationship to a legitimate public purpose. (*Plyler* v. *Doe, supra*, 457 U.S. at p. 216.)

The question we confront, therefore, is whether section 57103 impinges on the right to vote in a manner that requires the application of strict scrutiny. As will appear, the statute does not compel that standard of review.

We agree that section 57103 touches on the right to vote. As it happens, the right to vote does not include a right to compel the state to provide any electoral mechanism whatever for changes of municipal organization. Such line-drawing is a function that the Legislature may reserve to itself. (See *People ex rel. Younger* v. *County*

of El Dorado (1971) 5 Cal.3d 480, 502-503, 505.) But when the state has provided for the voters' direct input, the equal protection clause requires that those similarly situated not be treated differently unless the disparity is justified. (See *Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 665.) As we explain *post*, page — [typed opn., *post*, p. 18], federal precedent requires that we view all Sacramento County residents as similarly situated, for all are affected to some degree by the proposed incorporation.

The mere fact, however, that a state law touches on the right to vote does not necessarily require the application of strict scrutiny. (*Burdick* v. *Takushi* (1992) 504 U.S. —— [119 L.Ed.2d 245, 252].) Rather, "the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process." (*Choudhry* v. *Free* (1976) 17 Cal.3d 660, 664, quoting *Bullock* v. *Carter* (1972) 405 U.S. 134, 144.) As we now undertake to explain by reviewing federal precedent, section 57103's impact in the case before us falls well short of the "real and appreciable," for individual interests in voting are much attenuated by the state's plenary power to oversee and regulate the formation of its political subdivisions, and the same power entitles the state to identify as differing in degree the interests of those who may vote under section 57103 and those who may not.

In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance. (*United Building & Constr. Trades* v. *Mayor* (1984) 465 U.S. 208, 215; *Trenton* v. *New Jersey* (1923) 262 U.S. 182, 189-190; Cal. Const., art. XI, §§ 1, subd. (a), 2, subd. (a); § 23002.) Accordingly, the United States Supreme Court has long recognized the states' plenary power to create and dissolve their political subdivisions. In *Hunter* v. *Pittsburgh* (1907) 207 U.S. 161,

"the seminal constitutional decision addressing a challenge to a state procedure regulating the formation and organization of local governmental entities" (*Fullerton, supra*, 32 Cal.3d at p. 809 [conc. & dis. opn. of Kaus, J.]), residents of Allegheny, threatened with absorption by much larger Pittsburgh, challenged a Pennsylvania law authorizing the two cities' consolidation if a majority of the total votes cast in a referendum approved consolidation. One ground for the challenge was that the law was "in violation of the law of the land, it being . . . unequal . . . in that it permits the qualified electors of the larger city to overpower and outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city." (207 U.S. at p. 168, internal quotation marks omitted.) We read this assignment of error as raising an equal protection challenge on voting-rights grounds.

The federal high court, noting that "[m]unicipal corporations are political subdivisions of the State," concluded, "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . , expand or contract the territorial area, unite the whole or a part of it with another municipality, [or] repeal the charter and destroy the corporation . . . with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants . . . may by such changes suffer inconvenience [or] . . . the burden of increased taxation, . . . there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible

for any unjust or oppressive exercise of it." (*Hunter* v. *Pittsburgh*, *supra*, 207 U.S. at pp. 178-179.)

The foregoing language is, of course, immediately noteworthy for the breadth of its scope, and to a certain extent it bespeaks the judicial confidence of a simple era. But *Hunter*'s fundamental holding survives. "Although subsequent cases have properly recognized that *Hunter*'s broad language must necessarily be qualified by a state's fundamental constitutional obligation to avoid racial or other invidious discrimination (see, e.g., *Gomillion* v. *Lightfoot* (1960) 364 U.S. 339 [5 L.Ed.2d 110, 81 S.Ct. 125]), recent Supreme Court decisions have not wavered from the basic proposition that states have 'extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them.' [Citation.]" (*Fullerton*, *supra*, 32 Cal.3d at p. 810 [conc. & dis. opn. of Kaus. J.].)

In *Lockport* v. *Citizens for Community Action* (1977) 430 U.S. 259 (*Lockport*), the court faced a constitutional challenge to a New York law that forbade the implementation of a new Niagara County charter unless approved by concurrent majorities of both the city and noncity residents of the county. The unincorporated-area residents, though fewer in number, voted against the new charter; thus it was defeated even though a majority of the total votes cast favored it.

The concurrent-majority requirement was challenged on equal protection grounds. In deciding the question, the United States Supreme Court, though implicitly deciding the different classes of county resident were similarly situated because living in the county and affected by any charter change (see *Lockport*, *supra*, 430 U.S. at p. 268), applied the rational basis test. The court stated that if there "is a genuine difference in the relevant interests of the groups that the state electoral classification has created" then an "enhancement of minority voting strength" is permissible unless it "nonetheless amounts

to invidious discrimination in violation of the Equal Protection Clause." (*Ibid.*) In other words, if the state's citizens have different interests, then an electoral classification for a referendum that reorganizes local government will survive an equal protection challenge unless it works a purely arbitrary result.

Applying that test, the high court held that "the State's identification of the distinctive interests of the residents of the cities and towns within a county rather than their interests as residents of the county as a homogeneous unit" arose from "the realities of the distribution of governmental powers in New York, and is consistent with our cases that recognize . . . the wide discretion the States have in forming and allocating governmental tasks to local subdivisions [see *Hunter* v. *Pittsburgh*, *supra*, 207 U.S. 161] . . . ." (*Lockport*, *supra*, 430 U.S. at pp. 268-269.) Thus the state could decide that city and noncity residents possessed genuinely different relevant interests. And the court held that the classification was not arbitrary and hence did not violate equal equal protection principles. (*Id.* at pp. 272-273.)

Lockport recognizes the high degree of deference due to a voting-based classification when a state undertakes the essentially political task of apportioning power among its local governmental subdivisions—"constituent units that in a sense compete to provide similar governmental services" (430 U.S. at p. 272).

To be sure, *Lockport* did not decide what standard of deference applies when voters with a more diffuse interest in an incorporation are excluded from voting to confirm the result of a legislative scheme that tries to balance competing interests in the politically freighted incorporation process. To our knowledge, the United States Supreme Court has never addressed this question. But we conclude that we should not apply strict scrutiny. Under *Lockport*, *supra*, 430 U.S. 259, the residents in the area to be incorporated and the remaining residents of Sacramento

County possess, on the face of the law, genuinely different relevant interests. Thus, though the right to vote is perforce implicated whenever the state specifies that certain people may vote and others may not, we conclude that the essence of this case is not the fundamental right to vote, but the state's plenary power to set the conditions under which its political subdivisions are created. For that reason, the impairment of the right to vote is insufficiently implicated to demand the application of strict scrutiny.[9]

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[9] In analogous decisions the court has applied a deferential standard to far more direct impairments of individual civil liberties when the government exercises plenary regulatory power in areas substantially related to incidents of sovereignty.

In *Cabell* v. *Chavez-Salido* (1982) 454 U.S. 432, the court decided that although state classifications causing economic discrimination against lawfully resident aliens may be subject to heightened scrutiny (see also *Bernal* v. *Fainter, supra,* 467 U.S. 216, 219 & fn. 5 [stating general rule]), it would not apply the more exacting standard to California law that requires probation officers to be United States citizens. (§ 1031, subd. (a); Pen. Code, § 830.5, subd. (a).) The court reasoned that the requirement warranted judicial deference because it related to "sovereign functions of government" (454 U.S. at p. 438). "[S]trict scrutiny is out of place when the restriction primarily serves a political function: '[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government . . . .' " (*Id.* at p. 439; see also *Goldman* v. *Weinberger* (1986) 475 U.S. 503, 510 [turning back First Amendment challenge to military regulations forbidding the wearing of a yarmulke "even though [the] effect is to restrict the wearing of the headgear required by . . . religious beliefs."); *Fiallo* v. *Bell* (1977) 430 U.S. 787 [upholding immigration law's classification on the basis of the parent's sex or marital status].)

The military and immigration decisions are only analogues, but we find them useful because in a similar vein the high court has emphasized for decades the states' plenary power to control the formation of local governmental entities. (*Hunter* v. *Pittsburgh, supra,* 207 U.S. 161; *Lockport, supra,* 430 U.S. 259.) Such control falls within the ambit of California's " 'constitutional responsibility for the establishment and operation of its own government . . . .' " (*Cabell* v. *Chavez-Salido, supra,* 454 U.S. at p. 439.)

We reach the foregoing conclusion notwithstanding our prior decisions in this area.

Fullerton, supra, 32 Cal.3d 779, considered the constitutionality of a State Board of Education (hereafter education board) decision to calve a new school district in Yorba Linda from its Fullerton parent. The education board ordered an election to be held on the secession, and ordered the question submitted to the Yorba Linda electorate only. *Fullerton* overturned the education board's decision.

Fullerton's reasoning is embodied in a plurality opinion signed by three justices. The plurality concluded that the equal protection clause required strict scrutiny to be applied to the education board's decision to limit the vote to Yorba Linda residents. The plurality reasoned that because the decision impinged more than marginally or incidentally on the right to vote, it could be given effect only if the education board could show that it had a compelling interest in excluding the Fullerton residents and that the distinction was necessary to further its purpose. (*Fullerton, supra*, 32 Cal.3d at pp. 799-800.) And because the facts of *Fullerton* did not, in contrast to those of *Lockport, supra*, 430 U.S. 259, "present[] an intermediate situation [in which] city and noncity residents each had substantial but different interests in the controversy," that federal precedent did not apply. (32 Cal.3d at pp. 800-801.)

As noted, the reasoning of *Fullerton, supra*, 32 Cal.3d 779, was embodied in a plurality opinion. The case thus lacks authority as precedent (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 841; *Farrell* v. *Board of Trustees* (1890) 85 Cal. 408, 415-416), and the doctrine of stare decisis does not require us to defer to it (*Consumers Lobby Against Monopolies* v. *Public Utilities Com.* (1979) 25 Cal.3d 891, 902).

Moreover, *Fullerton*'s plurality opinion evinces a great concern that failure to apply strict scrutiny to the election at issue could result in racial segregation. It acquiesces in

but describes as "questionable" an administrative decision that the secession would not promote segregation. (32 Cal.3d at p. 793.) Hence, notwithstanding the agency finding, the plurality found an equal protection violation in part because "the racial and financial impact of that Plan are matters of great concern to the residents who will remain in the Fullerton [high school district]." (*Id.* at p. 806.) In the case at bench the parties have not alluded to any similar racial impact: the impact is purely economic.

The issue in *Citizens*, *supra*, 32 Cal.3d 816, was whether the Municipal Organization Act of 1977 (former § 35000 et seq.) constitutionally entitled the state to limit an election to confirm an annexation to residents of the territory to be annexed. The city in question had about 40,000 voters, while the territory to be annexed had about a quarter as many. The Legislature had provided that although under certain circumstances, applicable in *Citizens*, the territory's voters must confirm the annexation (former § 35228, subd. (b); see now §§ 57075, subd. (a)(2), 57103, subd. (d)), the annexing city's voters could also vote to confirm the joinder only if, as relevant to the analysis in *Citizens*, the number of registered voters in the territory was 50 percent or more of those in the city. (Former § 35231, subd. (b); see now § 56850.)

Unlike in *Fullerton*, a bare majority concurred in the reasoning of *Citizens*. We decided that "the establishment of the legal relationship contemplated in this case, like the dissolution of a legal relationship involved in *Fullerton*, has a substantial effect upon the residents of both territories involved. We therefore conclude that the relevant geographic confines, for the purpose of constitutional analysis, include[] both the affected territory and the affected city. We must therefore inquire whether the restrictions . . . serve a compelling state interest and are necessary to further that purpose." (*Citizens*, *supra*, 32 Cal.3d at p. 824.)

Applying strict scrutiny, we noted that the government may have a compelling interest to limit the vote to those "specially interested in the matter at issue" (*Citiezns, supra*, 32 Cal.3d at p. 825, citing *Lockport, supra*, 430 U.S. 259, and *Fullerton, supra*, 32 Cal.3d 779). And we concluded the Legislature could determine that when "the number of registered voters is not equal to 50 percent of the city's list, the impact of annexation on the city's treasury or voting rolls is insufficient to require an election in the city. [¶] We find no basis to question the line drawn by the Legislature. To be sure, any quantitative measure is in a sense arbitrary; we cannot say that a compelling interest required drawing a line at the case in which the territory has voters equal to 50 percent of the city's number instead of 40 percent or 25 percent. . . ." (32 Cal.3d at p. 826.)

We then turned to the least-restrictive-means prong of the strict scrutiny test. (*Citizens, supra*, 32 Cal.3d at p. 827, quoting *Dunn* v. *Blumstein* (1972) 405 U.S. 330, 343.) We noted that under former law, city residents enjoyed greater political participation in an annexation decision because the city council had to approve the change of organization. "Thus . . . the asserted state interests in avoiding the cost and burden of a city-wide election and the effect of aggregating territorial and city votes were achieved in a manner less restrictive of the political rights of city residents." (32 Cal.3d at p. 827.) But we decided that the state has a compelling interest in permitting unincorporated areas to join cities "even if the city's residents oppose annexation" (*ibid.*), because the state's interest in "promoting orderly and logical community development, and of providing municipal services to newly urbanized regions" (*id.* at p. 829) was "of compelling importance," and the state's interest would be thwarted if city residents could veto the annexation (*ibid.*).

Because *Citizens, supra*, 32 Cal.3d 816, unlike *Fullerton, supra*, 32 Cal.3d 779, commanded a majority of this

court, it requires our considered reexamination. As we now explain, we conclude in hindsight that the reasoning in that case was questionable.

For one, we now find faulty the holding of *Citizens* that a compelling interest in excluding less interested potential voters justified city voters' exclusion because the territory to be annexed contained less than half the number of voters residing in the city. (32 Cal.3d at pp. 826-827.) If strict scrutiny is given to an exclusionary voting scheme, the interest of those excluded from the election must be substantially less than that of those included for the scheme to pass muster. (*Evans* v. *Cornman* (1970) 398 U.S. 419, 422-423; *Kramer* v. *Union School District* (1969) 395 U.S. 621, 632.) It is impossible for us to now reconcile *Citizens* with the federal high court's prescription. We can no longer conclude that the city residents' interest in the election outcome was so insubstantial for equal protection purposes: the annexation would have increased the city's size by almost one-quarter. A claim of primary or substantial interest "cannot lightly be accepted," lest "lack of a 'substantial interest' . . . means no more than a diffeernt interest . . . ." (*Evan* v. *Cornman*, *supra*, 398 U.S. at pp. 422-423.) *Citizens* accepted the claim too lightly.

Given that conclusion, we also find constitutionally infirm the reliance of *Citizens* on the goals of orderly development and provision of municipal services (32 Cal.3d at p. 829) to justify the city voters' exclusion from the election. As mentioned above, *Citizens* reasoned that the exclusion was justifiable because the city dwellers might veto the annexation, thereby interfering with those goals. (*Ibid.*) But if the city residents have a fundamental right to vote, then the state's putative interest in excluding them from voting because they might veto the annexation is constitutionally impermissible. As correctly stated in *Fullerton*, "It is, of course, clear that the state cannot claim a compelling interest in excluding voters because of

how they may vote. (*Carrington* v. *Rash* (1965) 380 U.S. 89, 94 [13 L.Ed.2d 675, 679, 85 S.Ct. 775].)" (32 Cal.3d at p. 805.) As *Carrington* explained, " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." (*Carrington* v. *Rash* (1965) 380 U.S. 89, 94.)

To the extent that *Citizens*, *supra*, 32 Cal.3d 816, is inconsistent with the constitutional principles set forth in this opinion, it is not to be followed.

Of course we do not lightly disagree with a comparatively recent decision of this court. The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible. (*Payne* v. *Tennessee* (1991) 501 U.S. —— [115 L.Ed.2d 720, 736-737]; see *Akron* v. *Akron Center for Reproductive Health* (1983) 462 U.S. 416, 419-420.) Nevertheless, stare decisis compels less deference to precedent when constitutional principles are applied to deny effect to an enactment. (See *Akron*, *supra*, at p. 420 [stare decisis "perhaps never entirely persuasive on a constitutional question"].) If we were to follow *Citizens*, *supra*, 32 Cal.3d 816, and apply strict scrutiny, we would now be compelled to declare section 57103 invalid on constitutional grounds. Such a holding would greatly unbalance the Legislature's careful accommodation of competing local governmental and private interests in the subsequently enacted Cortese-Knox Act and would undermine the lawmakers' power over the existence of cities and counties. In such circumstances stare decisis carries less weight. (See *Payne* v. *Tennessee*, *supra*, 501 U.S. at p. —— [115 L.Ed.2d at p. 737] [stare decisis is not an inexorable command, and less so in constitutional cases in which correction through legislative action is practically impossible]; cf. *Quill Corp.* v. *North Dakota* (1992) 504 U.S. —— [119 L.Ed.2d 91, 111-112] [Scalia, J., conc. in part & conc. in judg., quoting *Patterson* v. *McLean Credit*

Union (1989) 491 U.S. 164, 172-173 [stare decisis "has 'special force' where 'Congress remains free to alter what we have done.' "]

We conclude that under applicable precedent we should apply a deferential standard in evaluating the classification set forth on the face of section 57103. The Legislature's traditional power to regulate the formulation of political subdivisions allows it to decide that the county residents living outside the territory to be incorporated have a lesser degree of interest in the proposed incorporation than those within, in which case the classification must be denied effect only if it lacks a rational basis. We turn to that question in part IV, *post*.[10]

III.

We have not entirely concluded our inquiry into the standard of deference to be applied to the confirming election, however. As will be recalled, plaintiffs' challenge is to section 57103 as it is applied to them. The Court of Appeal held that the equal protection clause requires Sacramento County's unincorporated-area residents to be able to vote on this question because of the county's singular governmental structure. But the Legislature ad-

[10] Perhaps because of the United States Supreme Court's guidance, no other jurisdiction has ever cited the relevant discussion in *Fullerton, supra*, 32 Cal.3d 779, or *Citizens, supra*, 32 Cal.3d 816, with approval. Rather, other courts have also held implicitly or explicitly, that the rational basis test applies to state legislation to exclude extraterritorial residents from voting on a change of municipal organization. (See *City of New York* v. *State* (N.Y. App. Div. 1990) 158 A.D.2d 169 [557 N.Y.S.2d 914] affd. 76 N.Y.2d 479 [561 N.Y.S.2d 154, 562 N.E.2d 118] [upholding a state law that may allow the borough of Staten Island to separate from New York City under conditions markedly less deferential to the City's interests than is the Cortese-Knox Act to Sacramento County's, and rejecting the reasoning of *Fullerton, supra*]; see also *St. Louis County, Mo.* v. *City of Town and Country* (E.D.Mo. 1984) 590 F.Supp. 731; *Moorman* v. *Wood* (E.D.Ky. 1980) 504 F.Supp. 467, 474-475; *Givorns* v. *City of Valley* (Ala. 1992) 598 So.2d 1338.)

dressed that concern with a commendable degree of attention to the county's demography.

As we have observed, the Cortese-Knox Act provides for a specially composed local agency formation commission for Sacramento County (§ 56326.5); other counties, also populous but not possessing Sacramento County's unusual governmental structure, receive no special consideration. Moreover, in 1973 the Legislature created an entire chapter of the Government Code (§§ 51900-51953) specifically addressing the effect of Sacramento County's unique circumstances on local government. (§ 51903.) The Legislature in effect urged the voters to adopt a consolidated city-county government similar to that of the City and County of San Francisco. (§ 51902.) We take judicial notice (Evid. Code, § 452, subd. (h)) that in November 1990 the voters of Sacramento County rejected a measure that would have created such a consolidated city and county.[11] It was thereafter that the Legislature, still striving to accommodate the county' unusual demography (see Stats. 1991, ch. 439, § 2), enacted section 56326.5, giving the county a unique local agency formation commission. Thus the Legislature has recognized the county's uniqueness and has twice attempted to accommodate its residents.

In addition, the facts of this case belie any claim of unusual financial detriment. As noted at the outset, the act's safeguards led to several modifications of the incorporation proposal designed to lessen its fiscal impact on the county. The board calculated that the net loss to the county from the incorporation of Citrus Heights would be some $2.5 million for the first year. The commission asserts that this loss—which it believes to be exaggerated—would amount only to some $5 per unincorporated-area resident. Even using the county's financial data, the commission found the loss would be less than 1 percent

[11] The unincorporated-area residents of Sacramento County rejected the measure by vote of 119,700 to 76,561.

of the county's total revenue and 3 1/3 percent of its discretionary revenue. The commission impliedly determined that this modest detriment would not bar approving the incorporation plan and submitting it to the voters. And the trial court found that the plan was sufficiently revenue-neutral to survive an abuse-of-discretion challenge, apparently under section 56107. Given the administrative record in this case, we conclude that under any standard of review the trial court's determination was sound.

For the foregoing reasons, we are unable to conclude that the impact of section 57103 was sufficiently real and appreciable in the case of the proposed incorporation of Citrus Heights to require the application of strict scrutiny (*Choudhry* v. *Free*, *supra*, 17 Cal.3d 660, 664): the Legislature has accommodated the county's unusual demography, and the financial impact on county residents is small.

IV.

Giving section 57103 the presumption of constitutionality to which every statute is entitled (*People* v. *Sanders* (1990) 51 Cal.3d 471, 495), we conclude that it must be given effect if it bears some fair relationship to a legitimate public purpose. (*Plyler* v. *Doe*, *supra*, 457 U.S. 202, 216.)

In section 56001 the Legislature announced a policy "to encourage orderly growth and development . . . essential to the social, fiscal, and economic well-being of the state," and stated that "the logical formation and determination of local agency boundaries is an important factor in promoting orderly development. . . . [T]he Legislature further finds and declares that this policy should be effected by the logical formation and modification of the boundaries of local agencies."

The foregoing sufficiently shows a legitimate purpose in enacting section 57103. And we conclude that section

57103 is fairly related to the Legislature's declared purpose, for if large, relatively disinterested majorities could veto incorporations decided through the Cortese-Knox Act's elaborate process, the result might well hinder orderly growth and development. Thus there is no invidious discrimination of the type referred to in *Lockport*, *supra*, 430 U.S. 259, 268.

Unlike in *Fullerton*, *supra*, 32 Cal.3d 779, which involved a discretionary agency decision to hold an election, the Cortese-Knox Act was constructed with a mighty bulwark against the exercise of arbitrary discretion. The act accommodates competing local governmental and private interests, narrowly channeling the commission's ultimate determination before the territory's voters consider the decision. The election merely asks the affected residents to confirm that they desire self-government. To deny the Legislature the authority to let the potentially incorporating territory's voters have the final say in the matter would be to lessen political participation, not increase it. We do not believe that result is required by our federal and state Constitutions. As we said in *Curtis* v. *Board of Supervisors* (1972) 7 Cal.3d 942, 965-966, "The ideal of maximum participation in democratic decisionmaking particularly applies to participation in the affairs of the city. One of the most striking and encouraging phenomena of our times has been the deep and renewed interest of citizens in local community matters. To frustrate the endeavor of individuals to fix the unit of their local governance . . . would be to stifle that self-determination. The seeds of democracy lay in the Greek city-state; we would be reluctant to stay the fruition of that democratic expression in the city of today. Neither the state nor federal Constitution sanctions such negation . . . ."

The act's accommodation of competing local interests may be imperfect, but that is not enough, by itself, to offend constitutional principles. As counsel remarked at

oral argument, "It's not a question of what would be the perfect arrangement as a matter of political science; it's what the Constitution requires."

We hold that section 57103's limitation does not violate the equal protection clause of the United States or the California Constitutions, either on its face or as applied to this proposed incorporation.

V.

The Court of Appeal's judgment is reversed with instructions to direct the trial court to enter judgment for defendant with respect to the constitutionality of section 57103. The Court of Appeals is to take such further action on the question of attorney fees as this disposition warrants.

In addition, certain plaintiffs, and amici curiae counties of Contra Costa and Santa Cruz, have requested partial publication of that part of the Court of Appeal opinion concerning the California Environmental Quality Act. (Cal. Rules of Court, rules 976(d), 976.1, 978(a).) The request is denied. Denial of a request for publication or partial publication is not to be construed as a reflection on the merits of such an opinion. (See *id.*, rules 978(c), 979(e).)

MOSK, J.

WE CONCUR: LUCAS, C.J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.

APPENDIX B

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

C006792

(Super.Ct.No. 358798)

SACRAMENTO COUNTY BOARD OF SUPERVISORS *et al.*,
Plaintiffs and Appellants

v.

SACRAMENTO LOCAL AGENCY FORMATION COMMISSION,
Defendant and Appellant;

CITRUS HEIGHTS INCORPORATION PROPECT,
Real Party in Interest and Appellant.

[Filed October 1, 1991]

APPEAL from a judgment of the Superior Court of Sacramento County, James T. Ford, Judge. Reversed in part, affirmed in part and remanded with directions.

Brenton A. Bleier, Peter Mixon, Remy and Thomas, Tina A. Thomas and James G. Moose for Plaintiffs and Appellants.

Hyde, Miller & Savage and Nancy C. Miller for Defendant and Appellant.

Downey, Brand, Seymour & Rohwer and Patrick J. Borchers for Real Party in Interest and Appellant.

INTRODUCTION

In the northern portion of urbanized Sacramento County lies a stretch of suburbs mostly east of Interstate 80 and mostly north of Greenback Lane popularly known as Citrus Heights. In the words of the Sacramento County Local Agency Formation Commission (LAFCO), Citrus Heights is "a component in the aggregate of unincorporated suburban areas which are administered by Sacramento County." In 1986 the approximate 69,000 (as of 1985) residents of this area breathed deep of the intoxicating aroma of self-determination and sought to incorporate as Sacramento County's fifth current municipality and first new city in two generations, thereby joining Sacramento (1850), Isleton (1923), Folsom (1946), and Galt (1946).[1] Forming the Citrus Heights Incorporation Project (CHIP) to "chip" themselves out of the suburban aggregate, they ultimately received the approval of LAFCO—in the form of Resolution No. 962B—on March 28, 1988, to hold an incorporation election. As CHIP sees it, "Citrus Heights always has been and will continue to be a cash cow; the County simply wants all of the milk." In the view of the Sacramento County Board of Supervisors (Supervisors) and other interested parties, the incorporation proposal would radically alter the delivery of municipal services, the collection of tax revenue, and land-use planning and consequently would devastate the remaining unincorporated areas left out of the new city. This appeal involves the legal challenges launched against the efforts of CHIP to incorporate the new City of Citrus Heights.

Concerned about the impact this incorporation would have on the remaining 489,000 or so (as of 1986) residents of unincorporated Sacramento County, the Supervisors, the Sacramento County Deputy Sheriffs' Associa-

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[1] The former city of North Sacramento incorporated in 1924 but disincorporated in 1964 upon its merger with Sacramento.

tion (Deputies), and Sacramentans to Save our Services (SSOS) filed a petition for a writ of mandate seeking to command LAFCO to vacate its resolution. Combined with this petition was a complaint seeking a declaration that Resolution No. 962B was invalid; a declaration that the election provisions of the Cortese-Knox Local Government Reorganization Act of 1985 (Cortese-Knox Act)—the statutes governing municipal incorporations (Gov. Code, § 56000 et seq.)—violate the guarantees of equal protection; and injunctive relief against the use of a "negative declaration" [2] in connection with Resolution No. 962B.

In the aspects of its ruling relevant to this appeal, the trial court found the petitioners' challenge timely, issued a writ of mandate which both vacated LAFCO's adoption of the negative declaration and stayed any further incorporation activities in connection with Resolution No. 962B until LAFCO prepared an environmental impact report (EIR), and issued a declaration denying the constitutional challenge to the Cortese-Knox Act. The court subsequently awarded attorney's fees to CHIP in the amount of approximately $28,000 pursuant to Code of Civil Procedure section 1021.5.

Both sides appealed. To be more specific, the Supervisors have made a limited appeal, challenging only the declaration that the Cortese-Knox Act is constitutional as applied and the award of attorney's fees, an appeal in which CHIP takes the lead as respondent. LAFCO has cross-appealed, challenging the timeliness of the writ petition and the merits of the trial court's decision that it could not proceed by way of a negative declaration; the

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[2] This is the name for a document filed pursuant to the California Environmental Quality Act, or CEQA (Pub. Resources Code, § 21000 et seq.), which represents that there are no significant environmental impacts from a project and that consequently no environmental impact report is required. (Pub. Resources Code, §§ 21064, 21068.)

Supervisors are joined as respondents by the Deputies and SSOS.

In our view, the most logical manner of proceeding is to examine in turn the timeliness of the writ petition, the merits of the writ's direction to prepare an EIR, the denial of the Supervisors' additional prayer for declaratory relief on the constitutionality of the proposed incorporation, and the propriety of the award of attorney's fees. After that examination, we find ourselves in agreement with the trial court's resolution of these issues except for the constitutionality of the Cortese-Knox Act as applied and the concomitant award of attorney's fees. On those questions we conclude that the Cortese-Knox Act is unconstitutional as applied here because the equal protection clause requires all residents of the unincorporated areas of the county, and not just the residents of the proposed city, to be accorded the right to vote on the issue of incorporation. This determination necessarily invalidates the award of attorney's fees to CHIP because it can no longer be deemed the prevailing party. Accordingly, we partially reverse the judgment and affirm the balance.

For ease of comprehension, we shall omit a separate, introductory statement of facts. Instead, we will incorporate into each section of the discussion the facts relevant to that contention.

DISCUSSION

I

Statutes of Limitations

A.

The facts of relevance to the statute of limitations naturally are primarily procedural. We will consequently skip any overview of the substantive legal scheme underlying the following actions.

In April 1986 CHIP filed with LAFCO[3] its notice of intent to circulate a petition to incorporate Citrus Heights. In November 1986, the Registrar of Voters and LAFCO certified that CHIP had collected a sufficient number (8,848) of valid signatures to qualify the petition. Following the preparation of a formal initial study by its staff, LAFCO filed a notice in February 1987 of its intent to issue a negative declaration "indicating that significant environmental effects will not occur," and requested comments from "[a]ny agency, organization or individual that wishes to provide information to support or dispute the preliminary determination . . . ." No opposition to the intended action was forthcoming. LAFCO issued the negative declaration and supporting initial

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[3] By statute, each county is required to have a local agency formation commission, commonly referred to as LAFCO. (Gov. Code, § 56325; City of Ceres v. City of Modesto (1969) 274 Cal. App.2d 545, 550.) Prior to the 1963 legislation which first created LAFCOs, the various urban, social and economic interests affected by the annexation process "engaged in a kind of warfare in which the unincorporated suburbs of the state have been both the prize and the battlefield, the annexation process a tactic, the location of annexation boundaries a significant weapon, and their calculated manipulation a commonplace event." (Tillie Lewis Foods, Inc. v. City of Pittsburg (1975) 52 Cal.App.3d 983, 995.) "After years of failing to cope with these problems to any meaningful extent, the Legislature finally acknowledged 'the need for a supra-local agency to intervene in boundary decisions' affecting local governments and, in 1963, established a LAFCO in each county to serve this purpose." (*Ibid.* [citations omitted].)

Among the purposes of this legislation are "the discouragement of urban sprawl and the encouragement of the orderly formation and development of local agencies based upon local conditions and circumstances." (Gov. Code, § 56301.) The Legislature intended therefore that each LAFCO should adopt policies which provide "planned, well-ordered, efficient urban development patterns . . . ." (Gov. Code, § 56300.) Thus, LAFCOs are empowered to "review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for changes of organization or reorganization." (Gov. Code, § 56375, subd. (a).) The incorporation of a city is a "change of organization" within the meaning of the statute. (Gov. Code, § 56021, subd. (a).)

study in March 1987. LAFCO then commenced a series of public hearings on the proposed incorporation. In May 1987, the commission members voted unanimously to adopt the negative declaration and approved Resolution No. 960 setting forth the incorporation proposal.

The Supervisors, the Deputies, and SSOS all filed requests for reconsideration of Resolution No. 960 in terms of the boundaries of the proposed city and the failure to prepare a report detailing the environmental impact of the incorporation. LAFCO held public hearings on the requests for reconsideration. In July 1987, it adopted Resolution No. 962 which excluded two shopping centers from the originally proposed boundaries of the city-to-be (which would reduce the sales tax impact of incorporation on the county by half) and made provision for a phase-in of property and sales tax transfers to the new city; Resolution No. 962 also formally certified the negative declaration. LAFCO then filed a notice of its determination to file a negative declaration.

The Supervisors received Resolution No. 962 for them to fulfill their ministerial duty under the Cortese-Knox Act, i.e., to enact the resolution subject to the confirmation of voters unless a majority of affected voters filed written protests. (Gov. Code, § 57077, subd. (a); 57078.) In September 1987, they opened a hearing on the matter for receipt of any written protests which continued from time to time until November.

On November 30, LAFCO adopted what it termed a "clerical" amendment to Resolution No. 962 to "avoid confusion" about the division of property tax between the new city and the county. It was the view of LAFCO that the miswording could lead to an interpretation that the new city would be entitled immediately to the full amount of property tax, rather than the phase-in which had been negotiated with the Supervisors. The amendment was termed "resolution 962A," and concluded "except as specifically amended herein, [Resolution No. 962] shall remain in full force and effect."

The Deputies and SSOS filed requests for reconsideration, stating they felt Resolution No. 962A could be successfully challenged, after which the language of Resolution No. 962 would be used to exact more money for the new city than actually agreed. Meeting that same day, LAFCO decided Resolution No. 962A was a mere correction which did not afford a new opportunity to file reconsideration requests, so it denied the requests and reconfirmed Resolution No. 962A.

On December 8, the Supervisors declined to take action on Resolution No. 962 or Resolution No. 962A. Instead, they adopted a resolution on December 15 requesting LAFCO reconsider Resolution Nos. 962 and 962A. Among the contents of the resolution were a request for the preparation of an environmental impact report in connection with the incorporation proposal and a request for a determination by LAFCO of the constitutionality of the Cortese-Knox Act. (But see Cal. Const., art. III, § 3.5.)

The incorporation proponents filed suit, challenging the failure of the Supervisors to enact Resolution Nos. 962 and 962A (Sacramento County Superior Court No. 357532). The court ruled the requests for reconsideration were timely filed because Resolution No. 962A was a substantive, indeed "essential," alteration. LAFCO then scheduled public meetings in February and March 1988. Prior to the meetings, LAFCO staff made a preliminary determination there was "no compelling evidence on this record to alter the original decision to issue a Negative Declaration." Following the meetings, LAFCO adopted Resolution No. 962B on March 28, 1988, which adopted in part and denied in part the reconsideration requests; at the same time, LAFCO also adopted Resolution No. 983, which declared there was no basis for a new CEQA document and readopted the original negative declaration. On March 30, LAFCO filed a new notice of determination of its intent to file a negative declaration

and transmitted the incorporation resolution to the Supervisors for action. The Supervisors, the Deputies, and SSOS filed the instant petition/complaint on April 28.

B.

The parties do not dispute the statute of limitations involved here.[4] "Any action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152." (Pub. Resources Code, § 21167, subd. (b).) As we held in Committee for a Progressive Gilroy v. State Water Resources Control Bd. (1987) 192 Cal.App.3d 847, 860-861 (*Progressive Gilroy*), "when a petitioner seeks review of a decision of a public agency on both CEQA and non-CEQA grounds, the petition must be timely filed for each claim. If not timely filed, the petitioner is foreclosed from obtaining review of those claims which are time barred. . . . [W]hen CEQA claims are joined with other grounds . . . , the CEQA statute of limitation applies to the CEQA claims and not the ordinary limitation period generally applicable to judicial review of [an] agency's decisions." Thus, this 30-day statute of limitations applies only to that part of the Supervisors' pleading which challenged LAFCO's exercise of its duties under CEQA.

LAFCO argues this part of the action is time-barred under the 30-day statute of limitations. In its view, Resolution No. 962 constituted the project approval which triggered the limitations period in July 1987, running out 30 days later in August 1987. LAFCO thus characterizes the effect of the reconsideration efforts of the Supervisors as an attempt to obtain a "subsequent or supplemental

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[4] Although filing separate briefs on this issue, the Supervisors, the Deputies, and SSOS have a unity of interest; therefore, we will refer to them collectively as the Supervisors.

[EIR]," which is required only where "[s]ubstantial changes are proposed in the project," "[s]ubstantial changes occur with respect to the circumstances under which the project is being undertaken," or "[n]ew information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available." (Pub. Resources Code, § 21166; see also Cal. Code Regs., tit. 14, § 15162 [CEQA Guidelines].)[5] It claims the Supervisors failed to satisfy any of these standards for supplemental/subsequent EIRs.

The Supervisors argue, on the other hand, that the enactment of the new resolution, Resolution No. 962B, caused the statute of limitations to run anew because of the reincorporation of the original negative declaration. The trial court accepted this argument: "the Court finds that it was the 962-B resolution which commenced the statute running, and that also adopted the negative declaration from the outset and, really, ab initio."

As a prelude to deciding between these conflicting views, we first dispatch LAFCO's assertion that courts must strictly construe CEQA's statute of limitations. None of the three cases it cites as purportedly standing for this proposition—*Progressive Gilroy, supra,* 192 Cal. App.3d 847; California Manufacturers Assn. v. Industrial Welfare Com. (1980) 109 Cal.App.3d 95; and Lee v. Lost Hills Water Dist. (1978) 78 Cal.App.3d 630—actually contain holdings to this effect. While *Lee* may

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[5] Sections 15000 et seq. of this title are called the "CEQA Guidelines," which were promulgated by the state Office of Planning and Research. "The Guidelines state, 'These Guidelines are binding on all public agencies in California.' (Guidelines, § 15000.) This court, however, has not decided the issue of whether the Guidelines are regulatory mandates or only aids to interpreting CEQA . . . . At a minimum, however, courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (Laurel Heights Improvement Assn v. Regents of University of California (1988) 47 Cal.3d 376, 391, fn. 2.)

state, "By the *express terms* of Public Resources Code section 21167, subdivision (b) the filing of the notice of determination triggered the commencement of the 30-day period of limitations" (78 Cal.App.3d at p. 634 [emphasis supplied]), this is hardly a clarion call for a narrow "reading" of the limitations statute, since there was nothing to interpret. Neither is the statement in *California Manufacturers Assn.* that the litigant's argument "flies in the face of the *clear language* of the statute[] [Pub. Resources Code, § 21167]." (109 Cal.App.3d at p. 125 [emphasis supplied].) In fact, our decision in *Progressive Gilroy* is to the contrary; the sole rule of statutory construction we invoked was the canon that a general provision is controlled by one that is special. (192 Cal.App.3d at p. 859.) However, we explicitly noted that we are enjoined as a matter of public policy to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. (*Id.* at p. 860 [citing Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 259].) Thus, if anything, we are to interpret this limitations period (if indeed we are called upon to do so) in a *broad* manner if it would help to protect the environment more fully.

We return to the words of the statute. As we have noted, the 30-day period in this case is triggered by "the filing of the notice required by Public Resources Code section 21152, subdivision (a)." (Pub. Resources Code, § 21167, subd. (b).) It cannot be denied that notice of determination for the particular incorporation proposal approved by LAFCO for the ballot, namely Resolution No. *962B*, was filed 30 days before the instant action. Under the plain words of the statutes, then, the Supervisors' challenge was timely. We held as much in El Dorado Union High School Dist. v. City of Placerville (1983) 144 Cal.App.3d 123: "If the public agency files more than one notice of determination, we perceive that CEQA permits suits challenging the agency's action filed within 30 days of the last notice." (*Id.* at p. 130.) Thus,

it is LAFCO and not the Supervisors that must resort to extratextual considerations.

First, LAFCO resorts to another section of CEQA. The statute cross-referenced by Public Resources Code section 21167, subdivision (b) states, "Whenever a local agency approves . . . a project which is subject to this division, it shall file notice of the approval . . . within five working days . . . with the county clerk of the county . . . in which the project will be located. The notice shall indicate the determination of the local agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an [EIR] has been prepared . . . ." (Pub. Resources Code, § 21152, subd. (a).) To quote the heart of LAFCO's argument, "LAFCO's actions on March 28, 1988, were merely a reapproval and refinement of Resolution 962 for the [p]roject originally approved on July 6, 1987." LAFCO then attempts to analogize to the holding of *Progressive Gilroy*,[6] in which we held that where an unchallenged EIR set a range for discharge of effluvia from a facility, subsequent approvals of permits adjusting the amount of discharge within the range initially assessed did not constitute separate "projects" for which a determination of potential significant environmental effects needed to be made. (192 Cal.App.3d at p. 863.) The analogy, however, is not apt. In *Progressive Gilroy*, the limits of the project—and the potential environmental effects within those limits—had been finally determined; the subsequent permits merely executed the previously approved levels. Here, by contrast, *no* project had been finally determined in its entirety before Resolu-

[6] LAFCO also attempts to analogize to *California Manufacturers Assn.* but the analogy utterly fails. The case held only that when challenging an alleged improper determination of environmental consequences, the statute of limitations did not depend on whether the agency's determination was valid or not (109 Cal.App.3d at p. 125); the case has absolutely nothing to do with deciding which of a series of determinations is the one triggering the statute of limitations.

tion No. 962B. Resolution No. 960 was one proposal for the incorporation of the new city; Resolution No. 962 was another, which changed the boundaries but did not enact the proper property tax agreement. Each proposal was independent. It does not matter that the differences might have been de minimis. Resolution No. 962B is not a mere addendum to Resolution No. 962, but is rather a complete resolution (which even takes the precaution of explicitly repealing earlier inconsistent resolutions). By contrast, Resolution No. 962A, as earlier noted, explicitly stated the earlier resolution (Resolution No. 962) was still in full effect except where contrary. Indeed, LAFCO itself states in its opening brief that "[u]nder the Cortese-Knox Act, Resolution 962B supersedes the previously approved resolution." (See Gov. Code, § 56857, subd. (g) ["If the commission approves the [reconsideration] request . . ., the commission shall adopt a resolution . . . which shall supersede the resolution previously issued."].)[7] As noted in the CEQA Guidelines (§ 15352, subd. (a)), "'[a]pproval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project . . . ." The definitive course of action with respect to the incorporation is set by Resolution No. 962B. And regardless of whether we look at the former or current version of Government Code section 56857, the determinations by

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[7] In its reply brief, LAFCO takes the impermissible task of asserting a new argument, namely that the current version of this code section did not go into effect until after the adoption of Resolution No. 962B, and the prior version of the statute (see Stats. 1985, ch. 541, § 3, p. 1985) had no explicit statement of the superseding effect of reconsideration. LAFCO takes this to be a change in the law. It is manifestly improper to raise arguments in this fashion without good cause, for which reason an appellate court is entitled to ignore them. (Balboa Ins. Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1010.) We note, however, that if we were to entertain this contention, the change in statute could be considered either merely procedural (and thus retroactive) or declaratory of existing law, particularly since the Legislature expressly eschewed any statement "regarding pending litigation" (see Stats. 1988, ch. 826, § 7).

the commission are not described in that statute as "final and conclusive" until after a request for reconsideration has been considered. As Resolution No. 962B was the only resolution with the correct boundaries and property tax agreement, its approval started a new CEQA limitations period for challenging the new negative declaration. Consequently we need not consider LAFCO's arguments regarding the lack of any basis for a "supplemental" or "subsequent" EIR pursuant to Public Resources Code section 21166 since they are now extraneous. Thus, we have no occasion to address the recent decision in Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467, cited at oral argument.

Under the Cortese-Knox Act, any person or affected agency may file a timely written request for reconsideration of any resolution adopted by a local agency formation commission which makes determinations. (Gov. Code, § 56857, subd. (a).) "If the commission approves the request, with or without amendment, wholly, partially, or conditionally, the commission shall adopt a resolution making determinations which shall supersede the resolution previously made." (Gov. Code, § 56857, subd. (g).) In light of these provisions, LAFCO resorts to a fallback argument, claiming "public policy" precludes giving effect to the express language of the limitations statute, because if a request for reconsideration is granted and thereby reopens the period for challenging an earlier negative declaration, this will induce LAFCOs throughout the state to deny reconsideration requests rather than risk undoing the finality of their negative declarations. It further claims this will also induce challengers to file spurious reconsideration requests in hopes of gaining a second chance at challenging the negative declarations. We need not fear this Hobbesian state of nature will reign as a result of our conclusion, because we are confident the LAFCOs are capable of denying spurious requests for reconsideration, and mandate exists to prevent any spurious denials of reconsideration. Moreover, the fact that some may abuse

the process does not entitle us to disregard the clear statutory language. We thus agree with the trial court that the challenge to LAFCO's decision to proceed with the incorporation by means of a negative declaration was timely.

II

Necessity of an EIR

We now reach the merits of the trial court's order directing CHIP, as the incorporation proponent, to prepare an EIR. First, we set out the standards governing our analysis.

A.

CEQA was enacted to ensure that long-term protection of the environment is the guiding criterion in public decisions. (Pub. Resources Code, § 21001, subd. (d).) It "establishes the administrative procedure of an environmental impact report. So that the environmental effect of every public agency action is assessed and evaluated, EIRs must be prepared for all 'projects' that 'may have a significant effect on the environment.' (Pub. Resources Code, § 21151.)" [8] (City of Livermore v. Local Agency Forma-

[8] A "project" is statutorily defined to mean the following: "(a) Activities directly undertaken by any public agency. [¶] (b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. [¶] (c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Resources Code, § 21065.) In Bozung v. Local Agency Formation Com. (1975) 13 Cal.3d 263, 279, the high court held "that a LAFCO approval of a city annexation is a project within the meaning of subdivisions (a) and (c) of section 21065." By analogy, an incorporation of a new city is similarly a project within the meaning of CEQA. Accordingly, the project in this case is the proposed incorporation of Citrus Heights. Indeed, LAFCO does not dispute that it is a "public agency" (Pub. Resources Code, § 21063) or that the incorporation resolution constitutes a "project" under CEQA.

tion Com. (1986) 184 Cal.App.3d 531, 537 [citation omitted].) In order to fulfill this objective, CEQA and its guidelines require that "[i]f there is a possibility that the project may have a significant effect [on the environment], the agency [must undertake] an initial threshold study; if that study demonstrates that the project will not have a significant effect, the agency may so declare in a brief Negative Declaration. If the project is one which may have a significant effect on the environment, an EIR is required." (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74 [citations and internal quotation marks deleted].)[9] Under CEQA, a "significant effect on the environment" is "a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources Code, § 21068.) The CEQA Guidelines build upon this, stating such an effect is "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." The guidelines exclude economic and social changes from this definition, but such changes are permitted to be considered either as a measure of the significance of the physical effect or as a part of a causal chain between the project approval and a physical effect. (CEQA Guidelines, §§ 15382; 15064, subd. (f).)

Where, as here, the decision by the public agency to issue a negative declaration is made as the result of a proceeding which did not require an evidentiary hearing, a court's review extends only to whether there was a prejudicial abuse of discretion. Such an abuse is established

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[9] If a project falls within a category exempted by administrative regulation or if it can be seen with certainty that there is no possibility that the activity in question has a significant effect on the environment, the agency need not even undertake the initial study. (Oro Fino Gold Mining Corp. v. County of El Dorado (1990) 225 Cal.App.3d 872, 881 [*Oro Fino*].) LAFCO does not invoke this branch of the decision tree.

where the agency did not proceed in a manner required by law or where the determination is not supported by substantial evidence.[10] (Pub. Resources Code, § 21168.5) Since the decision to adopt a negative declaration terminates any further considerations of environmental effects, CEQA has a low threshold for triggering the duty to prepare an EIR. Thus, an EIR must be prepared where it is "fairly arguable" that a significant effect will occur. (Citizen Action to Serve All Students v. Thornley (1990) 222 Cal.App.3d 748, 754 [*Citizen Action*].) Rather like the manner of assessing evidence in a motion for new trial based on a claim the verdict is contrary to law, if the reviewing court finds there is substantial evidence in the record in support of a fair argument that there might be a significant environmental impact, it does not matter that there is also substantial evidence showing there would not be a significant impact. In essence, the agency's determination to adopt a negative declaration can be upheld only where there is no credible evidence to the contrary. (*Ibid.*; *Oro Fino*, *supra*, 225 Cal.App.3d at p. 880.)[11] The court

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[10] The proceedings leading to the issuance of a negative declaration first contemplate a preliminary review of the environmental aspects of the project by the lead agency. (CEQA Guidelines, § 15060.) Following that review, the lead agency then conducts a initial study to determine if the project may have a significant effect on the environment. (CEQA Guidelines, § 15063.) In this process, the lead agency is directed to consult with responsible agencies and other public agencies. (Pub. Resources Code, § 21080.3.) Although this review and study process by the lead agency results in the collection of much evidentiary writings and materials, it is not one "in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency." (Pub. Resources Code, § 21168.) Consequently, review of LAFCO's decision to issue a negative declaration is governed by Public Resources Code section 21168.5 and not by section 21168 of that code.

[11] LAFCO is incorrect in citing the less exacting standard applied in *Laurel Heights Improvement Assn.*, *supra*, 47 Cal.3d at pp. 392-393, to the sufficiency of an EIR (where a court applies the deferential substantial evidence standard to the agency's find-

determines only whether there is a fair argument of a significant environmental impact, not whether there actually is or is not an impact. (*City of Livermore*, *supra*, 184 Cal.App.3d at p. 541.)

In cases involving reorganization of local government or rezoning, it must be shown initially that the approval of the project will have real consequences. This standard has been described as asking whether the decision will act as a catalyst for additional development (City of Antioch v. City Council (1986) 187 Cal.App.3d 1325, 1337), or is a "necessary first step" toward bringing plans into fruition (Christward Ministry v. Superior Court (1986) 184 Cal.App.3d 180, 195), or is a commitment to a change in use (City of Carmel-by-the-Sea v. Board of Supervisors (1986) 183 Cal.App.3d 229, 243-244). In contrast, where the consequences of the project are purely speculative—"the case of a rancher who feels that his cattle would chew their cuds more contentedly in an incorporated pasture" (*Bozung*, *supra*, (1975) 13 Cal.3d at p. 281)—then there are no effects with which to be concerned. (Perley v. Board of Supervisors (1982) 137 Cal.App.3d 424, 434, fn. 6 [mine operator's mere hope of being successful enough to expand operations someday not sufficiently concrete; operations of mine otherwise consistent with current land use].)

With respect to standards for the evaluation of evidence in the administrative record, those articulated in other appellate decisions are, of necessity, fact-specific. Nevertheless, certain principles may be gleaned from cases considering the propriety of negative declarations—

1. Conformity with the general plan for an area does not insulate a project from EIR review. (*Oro Fino*, *supra*,

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ings). Where our role is to ensure that an agency has not abjured its legal duty to *discern* significant environmental impacts, deference to its conclusion is not appropriate. (Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal.App.3d 1337, 1347.)

225 Cal.App.3d at pp. 881-882.) The comparison is between the possible effects of the project and the actual physical conditions of the area. (*Christward Ministry, supra*, 184 Cal.App.3d at pp. 190-191; Environmental Planning & Information Council v. County of El Dorado (1982) 131 Cal.App.3d 350, 354.)

2. The relevant personal observations of citizens are evidence. (*Oro Fino, supra*, 225 Cal.App.3d at p. 882.) However, mere concern or subjective speculation having no objective basis is not. (*Id.* at pp. 882, 884; *Leonoff, supra*, 222 Cal.App.3d at p. 1348; *Citizen Action, supra*, 222 Cal.App.3d at p. 756; cf. *Perley, supra*, 137 Cal.App. 3d at pp. 436-437.) The fact that experts may conflict in their testimony is not a basis for finding a fair argument exists, except in marginal cases where it is not clear whether there is substantial evidence of a significant effect on the environment. (*Citizen Action, supra*, 222 Cal.App. 3d at p. 755; CEQA Guidelines, § 15064, subd. (h)(2).) Whether expert or lay, the evaluation of the credibility of witness testimony is, of course, for the agency to determine, and it may reject any testimony for bias. However, it is not entitled to ignore uncontroverted testimony based on objective data. (*Oro Fino, supra*, 225 Cal.App.3d at p. 882; *Leonoff, supra*, 222 Cal.App.3d at p. 1349; Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 173 [*Sensible Development of Bishop Area*].)

3. Although it may be stating the obvious, we have had to inform at least one appellant that an agency's *conclusions* are not evidence. (*Perley, supra*, 137 Cal.App. 3d at p. 435.)

4. The CEQA Guidelines indicate the existence of a "serious public controversy" over the *environmental effects* of a project is sufficient to deem the effects signifi-

cant. (CEQA Guidelines, § 15064, subd. (h)(1).)[12] However, the CEQA itself states, "The existence of public controversy over the environmental effects of a project shall not require preparation of an [EIR] if there is no substantial evidence before the agency that the project may have a significant effect on the environment." (Pub. Resources Code § 21082.2.) Thus, there must be contested *facts* on which the controversy is based relating to environmental effects, which should tip the agency in favor of the *evidence* indicating a significant effect rather than the contrary evidence. (*Leonoff*, *supra*, 222 Cal. App.3d at pp. 1358-1359 ["feelings are not facts to govern environmental decisions"]; City of South Gate v. Los Angeles Unified School Dist. (1986) 184 Cal.App.3d 1416, 1426-1427; *Sensible Development of Bishop Area*, *supra*, 172 CalApp.3d at p. 173; cf. *Perley*, *supra*, 137 CalApp.3d at pp. 436-437; see *Oro Fino*, *supra*, 225 Cal.App.3d at p. 885, fn. 5.)

5. Under the CEQA Guidelines relating to the preliminary review of a project, an agency is directed to consider both the direct and indirect consequences of a project. (CEQA Guidelines, § 15064, subd. (d).) As earlier noted, an agency may measure the significance of a physical effect by the social and economic changes it causes and may also consider physical changes which are caused by the social and economic results of a project as though they were a result of the project itself. (CEQA Guidelines, §§ 15382; 15064, subd. (f).) As held in *Sensible Development of Bishop Area*, the net effect of these provisions requires the agency to consider the economic or social changes, although it may ultimately find them insignificant if they are unrelated to any physical changes. Thus, in *Sensible Development of Bishop Area*, the agency was directed to consider whether an economic

[12] This CEQA Guideline also explicitly states controversy unrelated to an environmental issue "does not require preparation of an EIR."

effect of the project's approval would result in physical deterioration of Bishop's downtown area. (172 Cal.App. 3d at pp. 170-171; accord *Citizen Action*, *supra*, 222 Cal.App.3d at p. 758).

6. Finally, it is the agency's burden to gather the relevant environmental data rather than the public's. Therefore, if the agency fails to study an area of possible environmental impact, the limited record will be held against it in the sense a fair argument can then be based on inferences from what facts are present that are not otherwise negated. (*Leonoff*, *supra*, 222 Cal.App.3d at pp. 1348-1349; Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 311 ["Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences."].)

B.

We make a prefatory comment before we look to evidence cited by the Supervisors as supporting a fair argument of significant environmental effect.[13] LAFCO has throughout these proceedings frequently adverted to the statement of policy included by the Legislature in the Cortese-Knox Act, which in relevant part declares, "The Legislature finds and declares that a single government agency, rather than several limited purpose agencies, is *in many cases* better able to assess and be accountable

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[13] Although its conclusion is not binding on this court (Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 Cal.App.3d 249, 260), we note the ruling of the trial court. "I think there was evidence in this record . . . that shows some potential for serious and significant environmental impacts f[rom] the incorporation of the City of Citrus Heights. And that may involve a number of areas adverted to by the experts and by the testimony on the record. [¶] The Court is satisfied there may be grave and significant impacts upon air quality, on traffic control, on a lot of other things that [a]ffect the quality of the lives, of the assistance of our entire county, and, indeed, of the entire region."

for community service needs and financial resources and, therefore, is the best mechanism for establishing community service priorities.' (Gov. Code, § 56001 [emphasis supplied].) Like some amulet containing a shard of the Holy Grail, this policy statement is hoisted to ward off arguments made by the Supervisors in favor of the preparation of an EIR. But it is "too late to argue for a grudging, miserly reading of CEQA." (*Bozung, supra*, 13 Cal.3d at p. 274). Moreover, this policy statement in the Cortese-Knox Act does not purport to say that incorporation is of such overweening importance that all other concerns are swept aside, including possible environmental effects. On the contrary, in a battle of these titans it is the fundamental public policy underlying the CEQA which surmounts that of the Cortese-Knox Act: "The Legislature further finds and declares that it is the policy of the state to . . . [d]evelop and maintain a high-quality environment now and in the future, *and take all action necessary to protect . . . and enhance the environmental quality of the state*[,] . . . [*and*] [*t*]*ake all action necesary to provide the people of this state with clean air* . . . [, and e]nsure that the long-term protection of the environment . . . *shall be the guiding criterion in public decisions.*" (Pub. Resources Code, § 21001 [emphasis supplied].)

We similarly reject the policy claim that there is an inherent right to incorporate. As has been noted, "the residents of [state] subdivisions have no federal constitutional right to self-determination." (See Comment, *Annexation Elections and the Right to Vote* (1973) 20 UCLA L.Rev. 1093, 1121-1122 [*Annexation Elections*].) Nor is there any such state constitutional right. (Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308, 320 ["this contention is grounded mainly upon the notion of an 'inherent right' of local self-government, which is contrary to the great weight of authority, and cannot be said to have been adopted in this state"].) Thus, any so-

called "right" to incorporate has no weight in the balance of our analysis under CEQA.

1.

LAFCO's preliminary tack asserts the approval of the incorporation project is a mere governmental reorganization without any consequences. According to LAFCO, since the area proposed for incorporation is "entirely devoted to urban uses," there is no "known or reasonably foreseeable change in land use." [14] Moreover, in LAFCO's view, any environmental effects are too speculative at this point and should await land-use decisions made by the proposed city's council (once that governing body comes into being) because an EIR would not be meaningful at this point. We disagree.

The particular approval before us (and LAFCO) is the last point at which the environmental impacts of creating yet another governmental subunit of the county can be assessed. Neither LAFCO nor anyone else can later disincorporate Citrus Heights if its birth proves to have negative environmental consequences. For example, to chose the worst-case scenario, the new city—with the approval of its residents—might engage in a course of development wherein benefits all inure to Citrus Heights and then assert such benefits were of overriding consideration (CEQA Guidelines, § 15093; see Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal.

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[14] To augment its assertion that incorporation would have no effect on the environment, LAFCO cites Government Code sections 57376 and 65360, claiming the new city would be required to maintain the existing land-use regulations for 30 months. We do not so read the statutes. Although these statutes have no direct bearing here, the former in essence requires a new city to enact an ordinance continuing all county ordinances for 120 days or until the city enacts superseding ordinances, whichever occurs first; the latter gives a new city 30 months to comply with the requirement that a general plan be in effect, but does *not* require the city to *wait* 30 months to do so. Conceivably, the new city council could enact a radically different land-use plan at its first meeting.

App.3d 886, 897) despite detrimental environmental effects being felt by the surrounding region. Thus, there is nothing "preliminary" about preparing an EIR at this point which contemplates the possibility of extensive development before that Pandora's box is opened. "[T]he environmental consequences of a proposed activity, whether public or private, [are to] be considered at the earliest possible stage." (City of Santa Ana v. City of Garden Grove (1979) 100 Cal.App.3d 521, 533.)

Nor are the future consequences too "uncertain" to assess at this point. The petitions for incorporation themselves express the intent of the incorporators to make their own decisions regarding land use; obviously a deviation from current county policy is contemplated. The fact that the area is currently zoned for "urban uses" does not mean there cannot be a change in the density of these urban uses. Since no part of Sacramento County, not even the downtown of the City of Sacramento, has reached a level of urban density equivalent to the isle of Manhattan, it does not require a seer to perceive there are two possible alternatives other than the status quo, i.e., more intensive development or less intensive development than currently planned. At one pole, a city of pastoral recycling bicyclists will have certain environmental consequences (presumably for the better); at the other pole, a city that transforms itself from a land of subdivisions and malls to a land of high rises to challenge the City of Sacramento's role as the commercial center of the area has other consequences (e.g., *Sensible Development of Bishop Area, supra*, 172 Cal.App.3d at p. 170). This point of inevitable change was forcefully made by J. Laurence Mintier, an expert presented by the Supervisors. "Incorporation will inevitably lead to changes in land use policy and changes in land use itself. The new city must adopt its own general plan within 30 months of incorporation. Adoption of the city's own conforming zoning and subdivision ordinances would follow. What direction the new city might follow in its land use policy

cannot be predicted. In general, however, there are at least three possibilities: (1) following existing County land use policies; (2) providing for more intense development; or (3) providing-for less intense development. There are also a number of other changes from existing policies that might be made concerning development standards, provision of affordable housing, and public facilities. The importance of land use decision-making in the incorporation proposal suggests that simple perpetuation of existing County policies is unlikely. [¶] None of these potential land use policy scenarios or the potential for changes in land use policy is discussed in the initial study prepared for the incorporation proposal. Instead, the initial study simply dismisses questions of future land use and transportation policies and impacts by stating these 'would not be known until the City Council renders specific decisions on these issues.' Nonetheless, they are characterized in the initial study as 'potentially critical unknown factors.' "

Obviously, at this stage the extent of these possibilities cannot be measured with exactitude, but by the same token that does not entitle LAFCO to close its eyes to them. "The fact that the environmental consequences of a rezoning may be more amorphous than those flowing from a precise development plan does not compel the conclusion that no EIR is required. The CEQA guidelines recognize that an EIR for zoning purposes will necessarily be less detailed than one prepared for a specific construction project. . . . In addition, Guideline section 15152 endorses 'tiering' EIRs so that later EIRs at subsequent phases of a project need not repeat material contained in earlier documents. Thus, the difficulty of assessing future impacts of a zoning ordinance does not excuse preparation of an EIR; such difficulty only reduces the level of specificity required and shifts the focus to the secondary effects." (*City of Carmel-by-the-Sea, supra*, 183 Cal.App.3d at p. 250; accord, *City of Antioch, supra*, 187 Cal.App.3d at p. 1337.) These same considerations apply to the proposed incorporation of a city.

We find general support for our conclusion that an EIR at this point is not too preliminary in *City of Livermore*. There, the particular LAFCO involved merely changed its guidelines for determining spheres of influence for cities (deleting a statement that urban development belongs in cities) and its guidelines for incorporations outside spheres of influence (basing them on county general plans); no particular project was under consideration. (184 Cal.App.3d at p. 536 & fn. 2.) Based on a consultant's report this *could* lead to growth outside cities and (1) the resulting deterioration of existing cities, (2) the deterioration of the cities' ability to repay bonds because of this diversion, (3) increased travel because of the increased sprawl, and (4) the possible conversion of agricultural land to other uses, the court found an EIR should be prepared. (*Id.* at pp. 541-543.) These consequences are no less "speculative" than the results of approving the incorporation before us.

Finally, we note that before filing the formal initial study in February 1987, various LAFCO staff members had at least a "gut" reaction that an EIR would be necessary. The estimate of the costs of incorporation by the county planning department stated, "Should Citrus Heights choose to incorporate, environmental documentation would be required. Most likely, an [EIR] would be required at an approximate cost of $20,000." At a preliminary meeting on the incorporation proposal back in January 1987, LAFCO's executive director, John O'Farrell, told the commission, "If you were to ask my advi[c]e right now . . . , I would suggest that you integrate an [EIR] into the staff report for [the incorporation] proposal. . . . [¶] . . . It is ultimately your decision whether or not you elect to adopt [a] negative declaration or require the . . . full [EIR]." This viewpoint was echoed by Alcides Freitas, the coordinator of the county's environmental impact section, who was providing CEQA services to LAFCO. Finally, a preliminary initial study that was not ultimately filed (which appeared as an exhibit

to the petition/complaint) concluded "an EIR will be required for this proposal."

Given these considerations, the approval of this incorporation is not too premature a point at which to assess possible environmental impacts. Prematurity aside, the question remains whether proponents of an EIR have pointed to sufficient evidence in the record to make a fair argument of such impacts.

2.

As noted, Mr. Mintier was the Supervisors' expert on air quality and traffic planning. He remarked on the undisputed fact that the Sacramento area is currently experiencing serious traffic congestion which is projected to become much worse. In his view, related to this problem is the Sacramento area's serious air pollution problem —the overwhelming bulk of which is produced by motor vehicles—which exceeds federal standards on an average of nineteen days per year despite the federal requirement that there be no more than one violation in a three-year period. In response to these violations of federal air quality standards, a council of local governments developed a regional air quality plan in 1982 which outlined programs for traffic flow improvements and the reduction in quantity and length of motor vehicle trips. The Supervisors adopted ordinances to this effect and hired a full-time transportation coordinator to oversee these programs for the unincorporated portion of the county. A major update of the 1982 accord has already been approved by the local governments in the region. According to Mr. Mintier, the addition of a new city to the region would delay implementation of the updated plan, a delay which would compromise the success of the plan. And since the solution to these problems requires cooperation among local units of government, adding additional players makes achieving a consensus that much more difficult. (See Comment, *Annexation Elections*, *supra*, 20 UCLA L.Rev. at p. 1101.) Moreover, in the opinion of Mr.

Mintier, localities tend to be more parochial in their interests than regional governments, so movement should be away from creating more local units. The effect of this and other incorporations "will be to further balkanize the local government structure in Sacramento County, superimposing a more fragmented pattern of land use control on an already fragmented pattern of public service delivery."

The sole response to these expressed concerns about air and traffic impacts came from Messers. O'Farrell and Freitas. Mr. O'Farrell admitted "[air and traffic] are notable problems and that they need to be dealt with in a coordinated fashion among whatever the jurisdictions might be" because they are "an important consideration." Mr. Freitas stated it was his opinion no EIR was needed because he did not see a link between approving the project and the air and traffic problems, although he, too, did not dispute "that there is a need [for] adequate transportation planning and [to] include the air quality planning for every area of the County."

Based on this evidence, the Supervisors maintain that a fair argument can be made for significant environmental impacts of incorporation. In light of the sensitivity CEQA mandates we display to possible effects, and in light of the fact LAFCO or CHIP have failed to amass any evidence which would negate an argument of significant impacts on air and traffic, we agree. As Mr. Mintier points out, the birth of a new city by itself creates an inconsistency with the regional air and traffic plans, which have been developed under the assumption the county would have authority over compliance in the area to be incorporated. This inconsistency would then lead to lag time either in the implementation of the whole plan or in compliance in the area of the new city (even assuming full cooperativeness on the part of the new city council). Either of these delays can have a significant effect on current air and traffic conditions. Further-

more, these specific problems, when considered in connection with the alternative of denser development we have just described in the preceding section, present a most definite prospect of significant impact. In a situation where air and traffic conditions are already unsuitable, any further degradation will undoubtedly be an addition for the worse. And, as pointed out by one of the LAFCO commissioners, all the major arterials for the northeastern part of the county go through Citrus Heights (e.g., I-80, Business 80, Auburn Boulevard, Madison Avenue, Greenback Lane, and Sunrise Boulevard).

In reply, LAFCO, whose burden it is as appellant to point with particularity to the evidence undermining the conclusions of the trial court (cf. *Perley*, *supra*, 137 Cal.App.3d at p. 434), asserts Mr. Mintier's opinions with respect to whether regional or local governments are better at handling air and traffic problems are not binding on it. We agree. However, the bulk of Mr. Mintier's presentation was not opinion, but the undisputed facts regarding current air and traffic problems and the plans which have been put into effect, which LAFCO is *not* entitled to disregard. LAFCO also claims the new city will be required to comply with the regional air and transportation plans. As a short answer, we need only note that the required compliance by current government entities has not caused the problems to go away, so the fact the new city will also be required to comply does not make its possible incremental effects on the environment evanesce.

In short, the Supervisors have adduced evidence of a region with severe traffic and air quality problems, and argue the addition of a new city could have a significant adverse incremental effect through the possibility of more intensive development or the delay inherent in suddenly adding a new player to the previously developed regional plans addressing these problems. LAFCO has neither made a sufficient counter argument nor adduced evidence to show these concerns have no basis in fact. Indeed, we

seriously question whether the initial study, with its simple checklist, even satisfies the agency's duty to supply the evidence for its conclusion that a negative declaration is appropriate (see *Sensible Development of Bishop Area, supra*, 172 Cal.App.3d at pp. 171-172), but we need not explore this in light of our conclusion a fair argument exists. Because a fair argument exists on this record, the trial court correctly ruled that an EIR was required.[15]

II

The Constitutionality of the Cortese-Knox Act as Applied

The Cortese-Knox Act[16] restricts the right to vote on the incorporation of a new city to the electors residing within the boundaries of the proposed new city. "In any resolution ordering a change of organization or reorganization subject to the confirmation of the voters, the [county board of supervisors (see Gov. Code, § 56029, subd. (d)(1))] shall call an election . . . [*w*]*ithin the territory* of each city . . . ordered to be incorporated . . . ." (Gov. Code, § 57103, subd. (a) [emphasis supplied].) In

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[15] Having identified one fair argument of a significant effect and the consequent invalidity of issuing a negative declaration, we need go no farther with the Supervisors' CEQA contentions. The guidelines mandate the nature of the contents of the EIR to be issued (see CEQA Guidelines, §§ 15120-15132), so anything else this court would have to say with respect to possible impacts would be purely advisory. We therefore need not resolve them in this opinion.

[16] This act consolidated the three major laws governing boundary changes by California's local governments into a single, unified law. As the court recounted in Fallbrook Sanitary Dist. v. San Diego Local Agnecy Formation Com. (1989) 208 Cal.App.3d 753, 758, "In 1985, the Legislature repealed the Knox-Nisbet Act (former § 54773 et seq.), the District Reorganization Act of 1965 (former § 56000 et seq.) and the Municipal Organization Act of 1977 (former § 35000 et seq.), and replaced these laws with the Cortese-Knox Act . . . .). (Stats. 1985, ch. 541, § 3, p. 1920.) The provisions of the new act, commencing with section 56000 became operative January 1, 1986. (*Ibid.*)"

their complaint for declaratory relief, the Supervisors alleged this provision of the Cortese-Knox Act, restricting any vote on incorporation to the residents of the proposed city, is unconstitutional because the class of voters consisting of the residents of the unincorporated portion of Sacramento County outside the proposed city were denied a vote on incorporation.[17] In their view, unlike other un-

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[17] The Supervisors' complaint is not explicit as to whether their constitutional attack is facial or as applied. However, their evidence in the administrative record (which we will subsequently recount) and their brief below focused on the unique character of Sacramento County with respect to municipal incorporations. (E.g., "Petitioners submit that [the trial court] is compelled to find that, *in view of the demonstrated effect upon the entire unincorporated area* . . . , the failure of the Legislature to make any effort to . . . balance the interests . . . renders the present statutory scheme [unconstitutional]" [emphasis added]; "As Petitioners indicated in their Opening Brief, it is not contended that *every* incorporation implicates equal protection concerns so as to require the broader franchise in the unincorporated area from which the incorporators wish to secede." [Emphasis in original].) At oral argument, counsel for the Supervisors purported to characterize their action as a facial challenge, even while conceding again that not every incorporation would require a broader franchise than provided by the Knox-Cortese Act. But a "statute is invalid on its face and wholly void only when incapable of any valid application. . . . A [facial] challenge to a statute's constitutionality must demonstrate that its provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. The corollary to the challenger's burden is that if the court can conceive of a situation in which the statute can be applied without entailing an inevitable collision with constitutional provisions, the statute will prevail. A statute is not facially unconstitutional simply because it may not be constitutionally applied to some persons or circumstances; . . ." (Mounts v. Uyeda (1991) 227 Cal.App.3d 111, 121-122, citations omitted.) Given these impediments to a facial challenge, we do not accept counsel's characterization and instead adhere to the substance of the challenge. As we have said, "A law may be unconstitutional in its application to a particular case, yet valid in its general application, especially where, as here, it is apparent that the Legislature would want the act to prevail where it constitutionally may." (Stork v. State of California (1976) 62 Cal. App.3d 465, 473; accord People v. Bradford (1976) 17 Cal.3d 8,

incorporated areas around the state, the unincorporated territory of Sacramento County is generally urbanized and the residents of this territory are dependent upon the County of Sacramento for many municipal services. "The proposed incorporation," the Supervisors argue, "would divert substantial revenues from the county to the new city, causing a significant disruption in the services provided to residents remaining in the unincorporated territory and therefore a decline in the quality of life for these residents." Thus, the Supervisors claim that, as applied here, the "Cortese-Knox Act creates two separate voting classes, each with a substantial interest in the incorporation election, but denies one class the right to vote in the election. The election statute allows only those residents who will benefit from the incorporation of Citrus Heights —the 'winners' in the incorporation process—to decide this issue. The 'losers' will be forced to stand on the sidelines, watching the inevitable decline of their vital municipal services, unable to influence their fate in any way." This division of the voters substantially affected by the proposed incorporation into two classes and then conferring the right to vote upon only one group, it is claimed, violates the equal protection clauses of the state and federal Constitutions. The trial court rejected this argument, finding no "abridgment of the franchise by reason of an incorporation by a city."

A.

"Constitutionally, no election is required to determine boundary changes: . . . [¶] However, once elections are to be held, the grant of voting rights is 'state action'

21.) Thus, this appeal is limited to the statute's effects on Sacramento County under the circumstances of this case, and we have no cause to address the application of our holding outside this context.

The Supervisors also raised several other constitutional arguments below, all of which have apparently been abandoned on appeal.

subject to the constraints of the equal protection clause [of the federal constitution]." (See Comment, *Annexation Elections, supra*, 20 UCLA L.Rev. at pp. 1105-1106 [footnote deleted].) In the context of a case such as this, the first step of the equal protection paradigm is to determine the level of judicial scrutiny to be applied to the legislative classification at issue since this analysis subsumes within it what certain courts have described as the initial step of determining whether the various classes are "similarly situated". (Fullerton Joint Union High School Dist. v. State Bd. of Education (1982) 32 Cal.3d 779, 798 & fn. 19 [*Fullerton*].) There are essentially two levels of judicial scrutiny used by both the California and federal Supreme Courts, the "rational relation" and "strict scrutiny" tests.[18] In the former, the legislative classification need bear only a rational relationship to any legitimate state purpose of which the court can conceive;[19] in the latter—invoked if the classifications are among those considered "suspect" or result in the impairment of a "fundamental interest" of one of the classes—the state bears the burden of establishing the classification is necessary to achieve a compelling interest.[20] (*Id.* at pp. 798-799.)

The right to vote is, of course, one such fundamental interest. (Weber v. City Council (1973) 9 Cal.3d 950, 959; Libertarian Party v. Eu (1978) 83 Cal.App.3d 470, 472.) While strict scrutiny is invoked only where the

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[18] To be precise, legal scholars have perceived nuances in this austere dichotomy, at least in federal jurisprudence. (E.g., Tribe, American Constitutional Law (2d ed. 1988) § 16-3, p. 1444 & § 16-26, at p. 1564 [positing a "heightened lower level" scrutiny and an "intermediate" scrutiny].) Fortunately, we may steer clear of these.

[19] "In applying the rationality requirement . . . [o]ften only [a] [c]ourt's imagination has limited the allowable purposes ascribed to government." (Tribe, *op. cit. supra*, § 16-3 at p. 1443.)

[20] "[S]trict scrutiny is, in Professor Gunther's formulation, 'strict' in theory and usually 'fatal' in fact." (Tribe, *op. cit. supra*, § 16-6 at p. 1451.)

impairment is "real and appreciable" rather than "incidental" (*Fullerton, supra,* 32 Cal.3d at p. 799; accord Lucas v. Superior Court (1988) 203 Cal.App.3d 733, 738), a classification which would result in the total disenfranchisement of an identifiable class of voters is obviously a real and appreciable impairment. (*Fullerton, supra,* 32 Cal.3d at pp. 799-800.) Our task, then, is to identify whether a class of voters may be said to be "excluded" here.

In *Fullerton* and its companion case, Citizens Against Forced Annexation v. Local Agency Formation Com. (1982) 32 Cal.3d 816 (*Citizens*), the California Supreme Court established the constitutional standard against which a legislative geographic limitation on the right to vote is to be measured. It first rejected the claim that geographic classifications triggered only the rational relation level of scrutiny. Two cases had been cited in support of that position by the State Board of Education. In Lockport v. Citizens for Community Action (1977) 430 U.S. 259 [51 L.Ed.2d 313], New York law required approval of any new county charter by separate majorities of the city and noncity residents of the county. (*Id.* at p. 260 [51 L.Ed.2d at p. 317].) The high court ultimately found the two groups of residents possessed differing but substantial interests in the new charter which would rationally support the state's imposition of concurrent approval by subdivisions of the county electorate. (*Id.* at p. 271-272 [51 L.Ed.2d at pp. 324-325].) As the *Fullerton* court put it, "The quoted language from *Lockport* makes it clear that the state can recognize that residents of different areas may have different interests and, in a single-issue referendum, can constitutionally require concurrent majorities.[21] But nothing in *Lockport* endorses

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[21] Were an election for *legislative representatives* involved, such a provision would violate the "one person/one vote" equal protection principles. But these have "little application to a single-issue referendum." (*Fullerton, supra,* 32 Cal.3d at p. 800, citing *Lockport, supra,* 430 U.S. at p. 266 [51 L.Ed.2d at p. 321].) For this

measures which deny the vote entirely to residents of one of the areas, nor permits such measures to escape strict judicial scrutiny." (*Fullerton, supra,* 32 Cal.3d at p. 801.) The other case was Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60 [58 L.Ed.2d 292]. The plaintiffs, nonmunicipal residents, had challenged the extraterritorial reach of certain municipal powers without the extension of the right to vote in the municipality. (*Id.* at p. 66 [58 L.Ed.2d at p. 299].) The high court rejected the claim that the plaintiffs were denied the right to vote, since no one in the *relevant* geographic entity (Tuscaloosa) was denied the right to vote. The Court thus upheld the statute's extramunicipal effect on the rational relation basis. (*Id.* at pp. 70, 75 [58 L.Ed.2d at pp. 301-302, 305].) As distilled by the *Fullerton* court, "In our view, [*Holt*] holds only that distinctions which coincide with the boundaries of the governmental entity concerned, and exclude no one physically resident within those boundaries, do not require strict scrutiny." (*Fullerton, supra,* 32 Cal.3d at p. 803.)

This was the standard *Fullerton* adopted. "[T]he constitutionally relevant boundaries" are "the geographic boundaries of the governmental entity concerned"; any measure which does not extend the franchise to all voters within those boundaries consequently invokes strict scrutiny. (32 Cal.3d at p. 302 [internal quotation marks deleted]; accord *Citizens, supra,* 32 Cal.3d at p. 822.)

The determination in the present case of the government entity "concerned" is far from self-evident. In order to select the proper level of scrutiny, we must examine closely *Fullerton* and *Citizens* (on which the parties have focused) to determine whether the proposed

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reason, our recent decision in Bjornestad v. Hulse (1991) 229 Cal. App.3d 1568, cited by the parties at oral argument, is inapposite, as it involved the extent to which the franchise must be extended in voting for representatives to the governing board of a water district.

city is the concerned entity, or whether the electoral net must be cast farther.

Fullerton involved a portion of a high school district seeking to secede and form its own high school district. The State Board of Education had limited the vote to the portion seeking to secede. (32 Cal.3d at p. 798.) The Court deemed the governmental entity concerned to be the parent district. "The [parent district], however, is . . . the existing entity with legal authority over high school education in [the seceding area]. (*Id.* at p. 803.) The court identified two impacts secession would have on the parent district. The parent district might "incur a substantial debt to the new [district], a debt which will have to be paid by the residents remaining in the [parent district]." Also, "the withdrawal . . . will leave the [parent] district with excess capacity and affect its educational programs." (*Ibid.*) Thus, the geographic limitation of the franchise to residents of the proposed new district excluded relevant voters, so it was a classification subject to strict scrutiny. (*Id.* at p. 805.)

Citizens involved unincorporated territory in the county seeking to be annexed by Rancho Palos Verdes, an existing city. Under a precursor of Government Code section 56850, only residents of the territory were allowed to vote on the issue. Residents of the existing city challenged this limitation. (32 Cal.3d at pp. 821-822.) The Court noted that the determination of the concerned entity "raise[d] a difficult problem . . . for . . . one can plausibly argue either that the relevant entity is limited to the . . . territory [to be annexed or deannexed] whose legal status will be altered by a successful vote . . . , or that it includes the [existing city]. . . ." (*Id.* at p. 822.) The Court resolved the boundary question in favor of finding that the government entity concerned included both the existing city and the territory to be annexed. "Academic analysis suggests that the relevant area includes both the affected territory and the affected city. . . . 'Annexing and annexed citizens clearly share gen-

eral concerns with the governance and welfare of the area . . . . When a state has chosen to enfranchise only one of the areas affected by the annexation, it must justify the disfranchisement of the other area by a showing that it promotes some significant state interest.'" (*Id.* at pp. 822-823 [quoting Note, *The Right to Vote in Municipal Annexations* (1975) 88 Harv.L.Rev. 1571, 1578-1581 (*The Right to Vote*)].) Framing these generalities within the context of the case before it, the *Citizens* court concluded, "[T]he anexation . . . at issue . . . affects not only [the] residents [of the territory], but also the present residents of the [c]ity. That impact is . . . the effect . . . of the establishment of a legal relationship. The residents of the affected territory will be entitled to vote in [c]ity elections and participate in [c]ity government. The [c]ity will acquire a right to assess taxes and to enforce its ordinances and regulations in the affected territory; it incurs also a duty to extend police protection and other municipal services to that territory. Thus, the establishment of the legal relationship contemplated in this case, like the dissolution of a legal relationship involved in *Fullerton*, has a substantial effect upon the residents of both territories involved." (*Id.* at pp. 823-824.)

Some guidance may also be drawn from Hawn v. County of Ventura (1977) 73 Cal.App.3d 1009. *Hawn* involved a county ordinance limiting the vote on any proposed county airport located even in part within a city to residents of the city. (73 Cal.App.3d at pp. 1012-1013.) *Hawn* does not explicitly follow the *Fullerton* paradigm, as it only denominated unincorporated residents as an excluded "identifiable class" of voters (thus triggering strict scrutiny) without articulating why these voters had a constitutionally recognizable interest,[22]

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[22] As perhaps illuminating the basis for this conclusion, we note the *Hawn* court stated later in its opinion, "The rationale of *Lockport* lends support to the contention that the airport ordinance before us constitutes an invidious discrimination against noncity

and then found the asserted compelling interest ("local environmental values") was not necessarily served by the geographic classification. (*Id.* at p. 1020.) However, the *Fullerton* court, with apparent approval, characterized the holding as invalidating a franchise restricted to city residents when both city and noncity residents were "directly interested" (32 Cal.3d at p. 802), which gives a further clue as to the criteria for determining the governmental entity concerned.

A case essentially parallelling *Fullerton* is San Dieguito Union High School Dist. v. Rosander (1985) 171 Cal. App.3d 968. An elementary school district wished to withdraw from the junior high school system offered by its parent union high school district. (*Id.* at pp. 971-972.) The statute governing the withdrawal election did not specify the "district" to which the election was limited—the elementary school district, or its parent union high school district. (*Id.* at pp. 973-974.) After concluding for a number of other reasons that the statute should be construed as opening the election to all residents of the parent district (*id.* at pp. 974-977), the court also found this interpretation mandated by the Constitution. It explained *Fullerton* as invalidating an election limited to one set of voters where other voters had a "substantial although different interest in the election." (*Id.* at p. 979.) Because of the financial impacts on the high school district resulting from withdrawal, all the voters in that parent district had a substantial interest, and could not constitutionally be excluded from the vote. (*Id.* at pp. 979-981.)

Finally, we consider the two law review pieces cited in *Fullerton* and *Citizens*. In *The Right to Vote*, al-

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residents and voters of Ventura County, since such voters are given no standing to object to the location of an airport in their community even though they *may be affected just as adversely* by an airport as the voters who reside within the cities of Ventura County. (73 Cal.App.3d at pp. 1021-1022 [emphasis supplied].)

though the Note is predominantly concerned with the constitutionality of the many voting schemes for annexations around the nation, it also analyzes whether the area *from* which the to-be-annexed territory comes (the "source" area) must be included in the election. "There may be cases, however, where the annexation's effect upon a definable source area is nearly equal to its effect upon residents of the annexing and annexed areas. When, for example, one municipality annexes land within another, the interests of the annexing and source municipalities, although probably opposed, approach mathematical equivalence: as one municipality's tax base, area of regulatory authority, and duty to provide services expand, the other's contract. . . . [I]n such intermunicipal annexation, the Constitution would require the enfranchisement of residents of the source municipality unless some [compelling] interest . . . can be advanced by the state . . . ." (88 Harv.L.Rev. at p. 1585 [footnotes deleted].) While the note suggests these concerns will not generally be implicated if the source area is a county (*ibid.*), the note concludes, "When annexation does result in complete removal of an area from the county, . . . the annexation procedure should probably be regulated like that of intermunicipal annexation. Similarly, the severity of regulation should increase, even when complete removal of an area is not at stake, if the county is providing relatively extensive services . . . , which may be subject to disruption." (*Id.* at p. 1585, fn. 77.)

Annexation Elections is similarly focused on annexations, not incorporations. However, in observations analogous to incorporations, it states, "When the regional impact is strong enough, residency requirements limiting voting to those on the land to be annexed may become extraneous, for in such instances they fail to delimit the group having a continuing stake in the decision. . . . The residents on the land to be annexed are not the only ones with a substantial interest in the election. When tax

rates, service levels, and traffic patterns may change in the city, the territory, or the county, . . . or land [can be] developed in a manner inconsistent with regional plans, those living on the land to be annexed are not the only individuals who have a substantial stake in the outcome of the election." (20 UCLA L.Rev. at p. 1113 & fn. 96.)

As CHIP reads these authorities, the common thread that links *Fullerton* with *Citizens* is that the establishment, or disestablishment, "of a legal relationship" determines the relevant boundaries. (*Citizens*, *supra*, 32 Cal.3d at p. 823.) Thus, in *Fullerton*, the decision to withdraw by the new school district would have completely terminated any legal relationship with the original district. Similarly, in *Citizens*, the annexation created an entirely new legal relationship between the unincorporated territory and the City of Rancho Palos Verdes. Here, in contrast, the citizens of Citrus Heights do not seek to terminate their relationship with the County of Sacramento. Rather, the incorporation would merely add another layer of government to that already in place within the unincorporated territory of Citrus Heights. The proposal at issue, it emphasizes, is to incorporate a City of Citrus Heights, not a County of Citrus Heights. Because the only new legal relationship in this case is the creation of a new city, CHIP argues the constitutionally relevant boundaries are the borders of that new city, and not the whole county.

We think CHIP misreads these cases. Every incorporation creates a new legal relationship between the new city, the remaining unincorporated territory and the county. Upon its incorporation, the new city is invested with municipal power over its affairs, the unincorporated territory remains under the tutelage of the county but loses its confederacy with the new city, and the county relinquishes local control over the new city. It is not the inevitable change of legal relationships that defines the

relevant entity for voting purposes. It is rather whether that change in boundaries and governmental relationships "has a substantial effect upon the residents of both territories involved." (*Citizens*, *supra*, 32 Cal.3d at p. 824.) Hence, it is the comparative impact of that change upon those outside the new city, and not the mere fact of a changed relationship, which sets the constitutional relevant boundaries. So, while it is a somewhat rubbery ruler, it is a potential voter's *substantial interest* in the change in government by being subjected to *significant effects* of the change which determines whether the residency line has been drawn in such a way as to result in impermissible disenfranchisement and the consequent strict scrutiny of that line. We must now apply this standard to the concrete context of unincorporated Sacramento County.[23]

B.

To understand why incorporation has a significant effect on the entire unincorporated area of Sacramento

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[23] CHIP argues that the Supervisors failed to adduce any evidence in support of their constitutional challenge. The evidence relied upon by the Supervisors is found in the administrative record already before the court in the same action. But CHIP claims this evidence was before the court only on the mandate cause of action and not for purposes of the declaratory relief cause of action. The argument is specious. The constitutional issue was briefed by the parties prior to the hearing on the basis of the administrative record and was then considered by the court and argued by the parties at the hearing. Indeed, counsel for CHIP expressly requested a ruling on the constitutional issue presented by the administrative record. "I think a ruling on these constitutional issues would be very helpful. . . . What would be the point of having us go doing an EIR, drawing another lawsuit, later to reexamine these constitutional issues that are now presented? So I think a ruling is entirely appropriate, and I think the folks from Citrus Heights have suffered enough without another lawsuit." Given these circumstances, whatever procedural error which may have occurred concerning the admission of the administrative record for purposes of the declaratory relief portion of the lawsuit was waived by counsel.

County, we must first look at its developmental history. We quote from Mr. O'Farrell's "Beginning Dialogue on Incorporation," presented to LAFCO in July 1986. "The system of governance in the unincorporated area has evolved, for the most part, during the last 30 years. The service pattern that resulted—County provision of many essential city-type services and a multiplicity of special districts—is not the norm for urban areas around the state nor did it occur because of happenstance. Suburban communities did not incorporate when they reached a population threshold or level of service expectation normally associated with urban areas. Nor did the urbanizing areas seek annexation to adjacent cities for their municipal needs. Communities continued to rely upon the County, special districts[,] and private providers for their services because those services have always been provided at exceptionally high levels."

The typical did not happen for two reasons. First, "The Board of Supervisors made implicit and explicit policy decisions to continually assert its hegemony over the unincorporated area." As he notes elsewhere, the Supervisors did this to keep control over the area to ensure "rational" land-use patterns. The Supervisors accomplished this "by . . . [a]llowing and encouraging independent and dependent special districts to form and function . . . ; [a]ctively providing basic life-support services through the creation of sanitary-sewer and water systems in selected areas; and . . . [r]emaining ambivalent to city annexation or incorporation." Second, "[r]esidents of the suburbs simply were not interested in the city form of government . . . because services have been offered at very high levels *and* because of the uncertainties associated with any type of major change of organization. Therefore, an idyllic relationship was established between County government and the unincorporated area communities. . . . [¶] The end result [has been] . . . the creation and maintenance of a pseudo-city of

550,000." (Emphasis in original.) As Mr. O'Farrell states in a 1986 factual summary, "[T]he unincorporated area . . . contains 62% or 558,048 of the total County population. Among urban counties statewide, it ranks first in unincorporated area population. . . .[¶] The municipal services provided to the unincorporated area are of a very high standard and are comparable to the level of service received by cities of the same size and scope. The Sheriff's and Public Works Departments may be the largest in the state and offer very sophistica[t]ed services." This has not been without a price. As Mr. O'Farrell notes elsewhere, "Over the years, the County has come to rely more and more upon . . . commercial development [of the unincorporated-area] to provide significant financial support for the provision of unincorporated area services."

In administering its authority over the unincorporated area, the Supervisors developed an accounting mechanism in the 1961-1962 budget allocating the costs of the various types of services the county provided. According to then-County Executive Brian Richter, "Sacramento County's General Fund (Fund 001) finances Countywide services, . . . regardless of whether those residents live in a city or in the Unincorporated Area. Most of the services financed by the General Fund are those state-mandated services actually delivered by the County such as health, welfare, and [the justice system (i.e., the courts, district attorney, public defender, and jails)]. Both regional parks and recreation and cultural and civic activities are also financed within the General Fund. The primary type of discretionary revenue for the General Fund is property tax. [These] services will remain the County's responsibilities regardless of how many cities may incorporate . . . ." The Supervisors also established the "Unincorporated Area Services Fund (Fund 013)," which is "the financing vehicle for the delivery of many municipal services to the residents of the Unincorporated Area,

including [sheriff] protection, planning and land use control, animal control, and [a percentage of the] general government [overhead]." Fund 013 receives 87 percent of its revenues from sales tax.

That the status quo will be disrupted by this incorporation proposal cannot be disputed. There is, of course, the loss of revenue to the county. The proponents make quite clear in their petition that their purpose is to "capture" sales and property tax (as well as other revenues) which happen to be generated within the physical area of the proposed city for use by its residents. And while the county will be transferring certain costs to the new city, in general the county would be giving up more revenue than it gains in cost reductions.[24] The parties differ only in their manner of computing the magnitude of this loss. (See, e.g., the feasibility study of the proponents; LAFCO's initial study; Mr. Richter's report to the Supervisors; and LAFCO staff's feasibility study [the amount of money the county would lose "is a key

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[24] To quote the 1987 LAFCO staff feasibility study, "Upon incorporation, certain services will be transferred to the new city . . . . [An exact listing of services transferred and retained appears in an appendix to the proponents' feasibility study, which need not be recounted here.] These services will be transferred along with the revenues and fees linked to the services [i.e., the sales tax, more of which happens to be generated than received as the area's per capita share of services]. In addition . . . [the "countywide"] services cannot be transferred to the new city, although the law requires that a portion of certain revenues that help to finance these services [i.e., the property tax] will be transferred to the new city." It is true, as county counsel has noted, that the county's manner of accounting for funds results in a "dichotomy of impact" of the incorporation which is "artificial in that it is caused by current budget policies which are not required by law." However, since the bulk of the Fund 001 services described earlier are among those mandated by the state over which the county has no control, this leaves the Fund 013 services to be targeted for cutback, so we may accept both the budget artificiality and the Supervisor's conclusion that it is the Fund 013 services which will suffer the brunt of the cuts.

finding and indicates that the incorporation . . . could have a potentially detrimental effect on Sacramento County operations and the delivery of services to the remainder of the unincorporated area"].)

This loss can be further increased by the timing of the effective date of the incorporation, since the county must continue to provide services until the end of the fiscal year, while the new city is immediately entitled to all revenues generated within its limits. But, for example, as the county sheriff testified at the May 1987 LAFCO hearing, a reduction of *any* amount would be unacceptable, since his department is already operating below the median number of deputies per resident.

In light of these facts, and based on the above admittedly meager body of case law, we conclude the governmental entity "concerned" is the entirety of the unincorporated area of the county. In Sacramento County, the county government is acting as a de facto city government for the unincorporated area, exercising its extensive regulatory and financial authority over it. Incorporation will disrupt this de facto legal relationship, even though the county will continue in its relationship as an agency of the state with respect to the new city. Moreover, incorporation may have more than de minimis effects on the levels of services provided to the remaining unincorporated area residents, requiring (as in *Fullerton*) stringent economies or a tax increase. (32 Cal.3d at p. 805.) While the effect may not be "apocalyptic" (as CHIP puts it), Mr. Richter pointed out at the June 1987 hearing that the county has so few truly discretionary revenues that any loss must be termed significant. Thus, no less than the remaining residents of the parent school district in *Fullerton*, the remaining residents of the "pseudo-city" of Secramento County have a substantial interest in the incorporation vote because they will be significantly affected by it. As a result, the limitation of the franchise by Government Code sec-

tion 57103, subdivision (a) to only the residents of the proposed city must be subjected to strict judicial scrutiny.

C.

This leaves the question of whether the state (as represented vicariously by CHIP) has satisfied its burden of demonstrating a particularized compelling interest in maintaining this classification. Since the trial court never called upon the incorporation proponents to meet this burden, we are left with the sole argument in CHIP's appellate brief. It relies on the compelling interest identified in *Citizens*, as permitting the incorporation vote to be limited to the territory seeking annexation despite the fact the issue affected the residents of the existing city as well.

The first interest advanced by the Los Angeles County LAFCO in *Citizens* was summarily rejected by the high court. The "cost and administrative burden of an election encompassing the affected city" is by itself "generally not of compelling character." (32 Cal.3d at p. 825 [citing both Comment, *Annexation Elections*, *supra*, 20 UCLA L.Rev. at pp. 1119-1120, and Note, *The Right to Vote*, *supra*, 88 Harv.L.Rev. at p. 1581].)

The second interest was the prevention of the votes of those "most" concerned with the issue (in the territory) from being overwhelmed by the much larger number of less-interested city voters. (*Citizens*, *supra*, 32 Cal.3d at p. 824.) In the companion *Fullerton* case, the Court had rejected an argument that voters could be excluded because their self-interest might defeat the referendum: "It is, of course, clear that the state cannot claim a compelling interest in excluding voters because of how they may vote." (32 Cal.3d at p. 805; accord Note, *The Right to Vote*, *supra*, 88 Harv.L.Rev. at pp. 1582-1583.) However, *Fullerton* would allow the exclusion of "uninterested voters in order to protect the interests of persons vitally concerned" although it did not find such a situation be-

fore it. (32 Cal.3d at p. 805.) In *Citizens*, the Court expanded upon this justification, finding that, despite the identification of a sufficient *potential* effect on city voters such that they constituted part of the relevant geographic entity for purposes of strict scrutiny, the relative numbers involved between the city and the territory might be such that it would be permissible to exclude an enormous number of city voters from an election involving a tiny number of territory residents because the addition of this marginal increment to the city would have no real effect; since the governing statute made voting classifications on this basis, the Court found it acceptable. (32 Cal.3d at pp. 825-827.)

The *Citizens* court then turned to the third interest advanced in order to determine whether the state met the further hurdle of showing the classification was not only based on a compelling interest, but was necessary to achieve that compelling interest. (32 Cal.3d at p. 827.) It concluded the state's interest in "promoting orderly and logical community development, and of providing municipal services to newly urbanized regions, [could not] be adequately met if city governments and their voters ha[d] a veto power over annexations . . . . [I]f city voters . . . have the final decision on annexation, the result might be to leave 'orphan' islands of unincorporated territory rejected by all neighboring cities but lacking the financial resources for self-incorporation." Thus, it was necessary to exclude the city voters when their numbers were such that annexation did not have a great impact on them. (*Id.* at p. 829.)

This reasoning does not apply in the Sacramento County context, essentially because here a piece may be removed from the whole rather than be accreted to a larger entity. First, the statute does not have any weighing mechanism for balancing the "vital" interests of those seeking incorporation against voters considered "uninterested" because of the magnitude of their numbers.

While this may be acceptable in the usual county, where the pocket which is seeking incorporation will outweigh the other scattered residents (for which reason the statute is not facially unconstitutional), in Sacramento County the "suburban aggregate" is losing over 10 percent of its population. Second, and more importantly, rather than further the state's interest in avoiding unincorporated islands, allowing sections of the unincorporated area of Sacramento County to incorporate willy-nilly without any say by the remainder of the area would, instead, lead to islands left behind, unwanted by the few areas which have a sufficient commercial base to incorporate in order to avoid loss of services.

CHIP has failed to identify a compelling interest served by the necessary means of denying the remaining unincorporated area residents a vote in the incorporation election. The unincorporated area has developed as a single "quasi-municipal" entity, albeit with individual community identities; CHIP cannot simply turn a blind eye to the pseudo-city which has developed since the 1950's and proceed with incorporation as though it had not been a part of it for all these years. As a result of the actions of the Supervisors with the quiescence of the unincorporated area residents, the pseudo-city may not be dismantled without the consensus of all; otherwise, the state's interests in sensible community development and in the provision of municipal services to as many state residents as possible will both be undermined. Thus, the franchise must be extended to the entire unincorporated area on any incorporation proposal in Sacramento County.

IV

Attorney's Fees

In its statement of decision, the trial court upheld the constitutionality of the incorporation voting provisions of the Cortese-Knox Act. Afterward it entered an order on the motion of CHIP for an award of attorney's fees

under section 1021.5 of the Code of Civil Procedure.[25] The trial court ruled that CHIP was the prevailing party with respect to the constitutional issue; that the issue was an important public right; that private enforcement was necessary; and that the private party did not have substantial enough an interest in enforcement of this right to be required to bear the financial burden of enforcement. Consequently, the court awarded CHIP its reasonable attorney's fees of approximately $28,000. The Supervisors appeal this determination.

"[Code of Civil Procedure S]ection 1021.5 is explicit statutory authority for court-awarded attorneys fees under a private attorney general theory." (Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 110.) This statute represents a codification of the standards developed by the Supreme Court in Serrano v. Priest (1977) 20 Cal.3d 25. (Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 317.)

The threshold question is whether CHIP was a prevailing party. "A necessary prerequisite to recovery under Code of Civil Procedure section 2021.5 is the status of prevailing party. While it is not necessary for [a party] to achieve a favorable final judgment to qualify for attorneys' fees . . . , there must be some relief to which the plaintiff's actions are causally connected." (Miller v. California Com. on Status of Women (1985) 176 Cal.App.3d 454, 457-458 [citation & emphasis deleted].) "[A]n attorney fee award may be justified even when [a party's] legal action does not result in a favor-

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[25] In pertinent part, the statute provides, "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery if any. . . ."

able final judgment." (Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1290-1291.) A party may be considered prevailing if it is successful on any significant issue which achieves the party's aim. (Hensley v. Eckerhart (1983) 461 U.S. 424, 433 [76 L.Ed.2d 40].)[26]

Since we have determined that the statute limiting the franchise to residents of the proposed city is unconstitutional as applied to Sacramento County, CHIP is no longer the prevailing party. Given our constitutional holding, CHIP cannot meet any of the standards just recounted for determining prevalance. We consequently must vacate the trial court's order awarding attorney's fees, and direct that the court issue an order denying the request.

DISPOSITION

That portion of the judgment declaring that the Cortese-Knox Act is constitutional and awarding attorney's fees to CHIP is reversed. The cause is remanded to the trial court with directions to enter a declaration that equal protection requires the franchise on the issue of incorporation to be extended to all residents of the unincorporated area of the county and to enter a new and different order denying CHIP's request for attorney's fees. In all other respects the judgment is affirmed. The Supervisors, the Deputies, and SSOS shall recover their costs of appeal. *(CERTIFIED FOR PUBLICATION.)*

SPARKS, Acting P.J.

We concur:

SCOTLAND, J.

NICHOLSON, J.

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[26] We may look to federal precedent in interpreting the reach of our statute, keeping in mind our statute's reach is broader than the federal equivalent. (*Miller, supra*, 176 Cal.App.3d at p. 458, fn. 5; Sokolow v. County of San Mateo (1989) 213 Cal.App.3d 231, 243-244.)

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 358798

BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO; SACRAMENTO COUNTY DEPUTY SHERIFFS' ASSOCIATION; and SACRAMENTANS TO SAVE OUR SERVICES,
Plaintiffs and Petitioners,

v.

LOCAL AGENCY FORMATION COMMISSION OF SACRAMENTO COUNTY,
Defendant and Respondent.

CITRUS HEIGHTS INCORPORATION PROJECT, a California corporation,
Real Party In Interest.

JUDGMENT ON PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, AND PETITION FOR WRIT OF MANDATE

[Filed May 4, 1989]

The Plaintiffs-Petitioners' Complaint and Petition for Writ of Mandate, Injunction, and Declaratory Relief came on regularly for hearing on February 22, 1989, in Department 23 of the above-entitled Court, the Honorable James T. Ford presiding. Plaintiff-Petitioner BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO ("Plaintiff BOARD") appeared by counsel, Brenton A. Bleier, Plaintiffs-Petitioners SACRAMENTO COUNTY DEPUTY SHERIFFS' ASSOCIATION and SACRAMENTANS TO SAVE OUR SERVICES appeared by counsel, Tina A. Thomas and James G. Moose, Defendant-Respondent LOCAL AGENCY FORMATION COMMISSION OF SACRAMENTO COUNTY

("Defendant LAFCO") appeared by counsel, Nancy C. Miller, and Real Party in Interest CITRUS HEIGHTS INCORPORATION PROJECT appeared by counsel, Patrick J. Borchers. The Court announced its disposition of the matter and its reasons therefor into the record.

The Court ORDERED that a Peremptory Writ of Mandate be issued (1) to vacate the decision by LAFCO approving a Negative Declaration for Resolution 962B. The Court ruled that a Negative Declaration was improper pursuant to the California Environmental Quality Act (CEQA) which requires preparation of an EIR when a project may have a significant effect on the environment; and (2) to mandate that Defendants LAFCO and CHIPs cease and desist all activities with respect to Resolution 962B unless and until an EIR is prepared in accordance with the California Environmental Quality Act (CEQA).

The Court DENIED the prayers of Plaintiffs-Petitioners to declare Resolution 962B void on the basis of a prejudicial abuse of discretion pursuant to Government Code Section 56107. The Court DENIED the prayers of Plaintiffs-Petitioners to declare the Cortese-Knox Act unconstitutional under various sections of the California and United States Constitution.

The Court rendered these rulings for the reasons set forth in the transcript attached hereto. The parties stipulated to use the Court's Oral Statement of Intended Decision as the Statement of Decision.

IT IS SO ORDERED.

DATED: May 4, 1989

/s/ James T. Ford
THE HONORABLE JAMES T. FORD
Judge of the Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

HON. JAMES T. FORD, JUDGE, DEPARTMENT 23

No. 358798

BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO;
SACRAMENTO COUNTY DEPUTY SHERIFFS' ASSOCIATION;
and SACRAMENTANS TO SAVE OUR SERVICES,
Plaintiffs,

-VS-

LOCAL AGENCY FORMATION COMMISSION OF
SACRAMENTO COUNTY, et al.,
Defendants.

CITRUS HEIGHTS INCORPORATION PROJECT,
a California corporation,
Real Party in Interest.

WEDNESDAY, FEBRUARY 22, 1989

REPORTER'S TRANSCRIPT OF
COURT'S RULING

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[2] The matter of Board of Supervisors of the County of Sacramento, et al., Plaintiffs, vs. Local Agency Formation Commission of Sacramento County, et al., Defendants, Case Number 358798, came on regularly before the Honorable James T. Ford, Judge of the Superior Court, State of California, County of Sacramento, Department 23 thereof.

The Plaintiff, Board of Supervisors of the County of Sacramento, was represented by Brenton A. Bleier, Attorney at Law, Sacramento, California.

The Plaintiffs, Sacramento County Deputy Sheriffs' Association and Sacramentans To Save Our Services, were represented by James G. Moose and Tina A. Thomas, Attorneys at Law, Sacramento, California.

The Defendant, Local Agency Formation Commission of Sacramento County, was represented by Nancy C. Miller, Attorney at Law, Sacramento, California.

The Real Party In Interest, Citrus Heights Incorporation Project, was represented by Patrick J. Borchers, Attorney at Law, Sacramento, California.

The following proceedings were then had, to wit:

(Other proceedings were reported, but not transcribed, as a part of this transcript.)

* * * *

THE COURT: All right. Court's prepared to rule in this matter.

(The court reporter conferred with the Court off the [3] record.)

THE COURT: Okay. Back on the record. First of all, let's review the agenda the Court constructed.

And, at the outset, I do want to express my sincere appreciation to all the lawyers in this matter. This is an example of very fine lawyering, and great help to the Court to be able to read with clarity all of the complex issues presented by this case, and each of your clients has been well served by the presentation of this case because these are hard concepts to get organized ap-

propriately and effectively, and all of you have succeeded admirably.

The Court's going to go back to the agenda it set up this morning with respect to the issues before it.

And, first, with respect to the allegation of residents, that the County failed to exhaust its remedies below for want of its objection, I'm satisfied that the Court does have to read the two relevant sections together, and that, in so doing, it's satisfied there is not an exhaustion problem here, and the County may pursue its remedies in this case. It's—it would be wrong, I think, to read (b)—sub (b) independent of sub (a), and, to the extent that any person has raised objections hereto, I think the County appropriately can set forth its claims as well.

And that decision with respect to exhaustion is sort of affected too by the Court's intended decision with respect to the second issue involving limitation of challenges to the property tax exchange formula.

And the Court is satisfied that it is not prepared to [4] find that the negative declaration determination back in 1987 is sufficient, standing alone, absent some resolution for incorporation, and that this is not analogous to a determination entity in one respect and then a subsequent determination to determine that no changes have occurred since the original one.

These negative declarations with respect to incorporations, if any there be, which we will talk about later, have to be a single operation and not a—there is no duality, in the Court's view.

And so, accordingly, the Court finds that it was the 962-B resolution which commenced the statute running, and that also adopted the negative declaration from the outset and, really, ab initio. Accordingly, the challenges thereto can't be limited to the matters taken up; I think more appropriately in the 962-A process. So the Court does find that there is no limitation with respect to the challenge that may be brought with respect to the negative declaration question.

Third, the Court has examined the question of whether or not there was any abuse of discretion for failure to preserve revenue neutrality in this matter. And the Court is not satisfied that there is evidence insufficient for that purpose. I do not find any abuse of discretion on the part of LAFCO in this determination. I think they did not start from a faulty major premise that the references to the fundamental right to cityhood had to do with the pursuit thereof before it, and LAFCO, I think, correctly determines that it does not have the power to preclude persons, who meet minimal requirements, to seek incorporation, and that that premise did not carry over to [5] determine whether or not incorporation should appropriately be recommended to the Board of Supervisors by its resolution.

So the Court is not—finds expressly there was no abuse of discretion by LAFCO with respect to that determination.

Next, with respect to CEQA, the Court has had a careful concern with respect to CEQA's requirements in this case, and I am mindful of the fact that in no other incorporation process of a local agency formation commission has the EIR been either prepared or required or determined was necessary. The fact that it has never been done in the past, however, is not conclusive evidence that it should not, in fact, have been done in the past and should not be done in the future.

I think it goes to this determination as to what Courts should do when faced with a negative declaration circumstance when any public entity determines, in the first instance, that there is a project with respect to which at least a negative declaration is required. And this clearly is a project, and the entity recognized that at the outset and determined that it would have to determine whether or not a negative declaration is required.

In doing so, they can nip the environmental assessment process in the bud by determination that there are, in fact, no significant environmental impacts that might

result by reason of the action about to be taken. Where the record discloses, it seems to me, substantial evidence that in fact there may be such circumstances—and there are; there is testimony and evidence in the record—then I think, for the judicial branch to ignore that and determine only that where substantial evidence exists [6] in the record that there is none, it goes into a swampy area by which it may well be that the salubrious purposes of the environmental quality system devised by our legislature for the State of California and exhaustively treated by the legislative branch of government could be thwarted. I don't think that is appropriate or fair.

I think there was evidence in this record, that the Court perceives in the language of Friends of "B" Street, that shows some potentiality for serious and significant environmental impacts for the incorporation of the City of Citrus Heights. And that may involve a number of areas adverted to by the experts and by the testimony on the record.

The Court is satisfied that there may be grave and significant impacts upon air quality, on traffic control, on a lot of other things that effect the quality of the lives, of the assistance of our entire county, and, indeed, of the entire region. To the extent an Environmental Impact Report may disclose there are no such impacts, that may well be well and good, or, in the alternative, to the extent those may be shown to be mitigated by other measures, that, too, may be a satisfactory resolution to the matter. Or, alternatively, I suppose ultimately the public entity can be held accountable if they find no mitigatable environmental impacts and, therefore, decision to do so and go forward with the plan, regardless of those environmental impacts, they can be held accountable to the voters ultimately.

The Court again is merely preserving the process; has nothing to do with the decision and doesn't know whether there [7] will be any environmental impacts or not, and it's not up to the Court to determine whether, in fact,

there will be. The Court is merely in a very limited role, determining whether or not there is evidence by which a fair argument was made at the time that there might be such environmental impacts running from the not trivial to the momentous. And the Court is satisfied this record discloses such fair argument, and, as a consequence, environmental impact report was required and the resolution adopting the negative declaration was violative of California's Environmental Quality Act.

Finally, with respect to constitutionality of the issues, the Court is not satisfied that there is sufficient evidence that the Cortese-Knox scheme is unconstitutional by reason of the want of distinction between—or, rather, the existence of the distinction between annexation and incorporation. I do not find that the City of Citrus Heights is seceding from the County of Sacramento, and I do not find that there is any necessity by which the addition of a layer of government, to the extent governmental scheme approaches the kind of issues, that should be addressed in annexation questions, wherein—or the removal and deannexation questions. Those, to me, are significant issues, and, obviously, the relative significant impacts should be applied to those, as the Cortese-Knox act admits and allows for. That's quite another matter, it seems to the Court, with respect to incorporation. I do not find that there is any compelling necessity or that the test even is evoked or invoked by reason of incorporations, since I don't find any abridgment of the franchise by reason of an incorporation by a city.

[8] Accordingly, the constitutional challenge as to the voting area is denied.

Next, with respect to the remaining constitutional issues involving Serrano versus Priest, involving the question of super majority requirements and the impediments by reason of Article 13-B of the Constitution, the Court finds that those issues are specifically not ripe for the discrimination by the Court, that there is an uttered paucity of evidence with respect to any circumstances

by which the Court could start to address, whether or not the Cortese-Knox scheme is constitutionally flawed for a failure to mandate revenue neutrality.

It doesn't seem to me that the Court has before it a case in which it can determine, number one, there has been an abridgment of the rights of our assistance as a whole for either reasons set forth in Serrano versus Priest or the Proposition 13 voting requirements or the State mandated programs under 13-B or subvention requirements under 13-B, and, as a consequence, for the want of such judicable controversy, the constitutional challenges on those grounds is denied.

And there being no further matters before me, the Court will ask you, Mr. Bleier, to prepare a decision consistent with this announcement of intended decision.

MR. BLEIER: I will. Thank you very much.

THE COURT: Thank you.

MS. MILLER: Thank you, Your Honor.

(The proceedings were then adjourned.)

APPENDIX D

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

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3 Civil C006792
Sacramento 358798

BOARD OF SUPERVISORS SACRAMENTO COUNTY,
Plaintiff, Appellant
and Cross-Respondent

vs.

LOCAL AGENCY FORMATION COMMISSION,
Defendant, Respondent
and Cross-Appellant

CITRUS HEIGHTS INCORPORATION PROJECT,
Real Party In Interest,
Respondent & Cross-Applt.

[Filed October 25, 1991]

By the Court:

Respondents' petition for rehearing is denied.
Dated: Ocotber 25, 1991

SPARKS, Acting P.J.

APPENDIX E

[*Selected Excerpts from the Administrative Record Below*]

[MEMORANDUM DATED JULY 8, 1986]

TO: Sacramento Local Agency Formation Commission

FROM: John S. O'Farrell, Executive Officer

RE: Beginning Dialogue on Incorporation

The pursuit of cityhood is both a fundamental right and privilege of the citizens residing and working within an unincorporated community. Any area which meets elementary state requirements has the "right" to pursue incorporation; those elementary requirements include a minimum of 500 registered voters and a proposed city boundary containing only contiguous territory located in one County. If the community meets these basic requirements, it must then also pass a variety of rigorous policy and procedural tests to ultimately achieve the "privilege" of cityhood.

LAFCo plays the central role in this litmus process. The State charge to LAFCo is to serve as the impartial regulatory agency in an incorporation proceeding. LAFCo also determines a property tax transfer, makes an environmental assessment and recommends a Gann limitation for the prospective city. The Commission can promote the logical and orderly formation and development of new local governments through its enforcement of mandated cityhood procedures and adoption of its own local policies, or it can stop that process if it finds compelling reasons to do so. The local policies and attitudes are the key to the success or failure of an incorporation effort.

Three separate incorporation proposals are currently being pursued in different locations of the County. I am

fairly confident that at least two of the proposals will meet the requirements for LAFCo hearing later this year.

The last time the Sacramento LAFCo considered the prospect of a new city and its ramifications was in 1978 (Citrus Heights). During the last eight years, several events have occurred which impact new cities, the County and other affected local agencies. First and foremost, there is Proposition 13. Proposition 13 precludes new cities, or other local agencies, from imposing additional ad valorem property taxes above the 1% of valuation. This was not true in 1978. The proposed City of Citrus Heights at that time needed additional taxes to make it viable *and* it was legally permissible to impose the additional taxes. Today, one of the most significant consequences of Proposition 13 is that no additional taxes are permitted; therefore, any new city property taxes must be extracted from other agencies: the County and/or Special Districts. Secondly, Proposition 4 (1979), the Gann limitation, has made it difficult for some cities, counties and districts to spend tax money ("proceeds from taxes") even if there is an abundance of revenue in the coffer. Proposition 4 requires that an appropriation or "spending limit" be established for all public agencies in California. This requirement did not exist in 1978. Finally, revenue sharing, once a relatively important discretionary revenue source for cities and counties, has been abolished, effective fiscal year 1988-89. Then there still are other factors which cause the shift from unincorporated to corporate status and its consequences to be considered as the most fundamental organizational change a community will experience. And, incorporation is not a self-contained action. The County loses service responsibility and revenue, land use authority, general government responsibility; special districts may also lose service responsibility and revenue. With these thoughts in mind, I believe it is important to

review and consider past and current policy on incorporation and state law.

* * * *

CONCLUSION

The system of governance in the unincorporated area has evolved, for the most part, during the last 30 years. The service pattern that resulted—County provision of many essential city-type services and a multiplicity of special districts—is not the norm for urban areas around the state nor did it occur because of happenstance. Suburban communities did not incorprate when they reached a population threshhold or level of service expectation normally associated with urban areas. Nor did the urbanizing areas seek annexation to adjacent cities for their municipal needs. Communities continued to rely upon the County, special districts and private providers for their services because those services have always been provided at exceptionally high levels.

Yet, as the communities grew in population and service needs, they evolved into urban places which are similar in many respects to, and have the same service requirements as, an [sic] incorporated municipalities. But these communities never opted to change the pattern of service delivery.

Neither of the traditional patterns of structural development—incorporation or annexation—was followed in Sacramento County for several reasons:

(1) The Board of Supervisors made implicit and explicit policy decisions to continually assert its hegemony over the unincorporated area. It accomplished this by:

—Allowing and encouraging independent and dependent special districts to form and function in the unincorporated area;

—Actively providing basic life-support services through the creation of sanitary-sewer and water systems in selected areas; and,

—Remaining ambivalent to city annexation or incorporation.

(2) Residents of the suburbs simply were not interested in the city form of government. Suburbanites have been complacent about structural change because services have been offered at very high levels *and* because of the uncertainties associated with any type of major change of organization. Therefore, an idyllic relationship was established between County government and the unincorporated area communities. This relationship has persisted for many years.

The end result of the Board of Supervisors' policy decisions and prevailing attitude by unincorporated area residents resulted in the creation and maintenance of a pseudo-city of 550,000. This "pseudo-city" is composed of many separate and identifiable communities, all of which have homogenous service requirements. The idyllic relationship of the unincorporated communities to the County was bound to change at some point. Dissatisfaction was first expressed during the mid-seventies but nothing came of it. Several of the communities that make up the metro-complex again have expressed dissatisfaction with the service structure/delivery system as well as land use decisions by the Board of Supervisors and other elements of County government. The dissatisfaction varies community by community, but has been strong enough in Elk Grove, Citrus Heights and Rancho Cordova to become the impetus for new incorporation proposals.

The coming year will bring to bear many important policy issues relative to the incorporation question in each of the communities. I am not asking that you take a position on any of these items at this point, but I want you to be aware of them. They are:

The impact of incorporation on the County in terms of:

—Loss of Service Responsibility

—Loss of Revenue Associated With That Service

—Loss of General Fund Property Tax Which Finances Countywide Services (See Editorial)

—Effective Date of Incorporation/"Free" Service Provision

The impact of incorporation on Special Districts in terms of:

—Loss of Service Responsibility/Revenue

—Residual Special District Territory Remaining After Incorporation—What To Do With It

The impact of incorporation on Adjacent Communities in terms of:

—Inclusion of Territory of an Adjacent Community's Prospective Sphere of Influence Within City Boundaries

The Question of Boundaries:

—Is It Appropriate to Include Rural Lands?

—What Determines a Community Area: Zip Code, Planning Area, Special District Boundaries?

cc: Board of Supervisors

Incorporation Groups

[Volume I Administrative Record at 183-190.]

INITIAL STUDY
PROPOSED MUNICIPAL INCORPORATION
FOR CITRUS HEIGHTS

Project Description:

The proposed propect consists of a reorganization pursuant to the Cortese-Knox Local Government Reorganization Act of 1985, to include the following:

1. The incorporation of the City of Citrus Heights; and

2. The merger of the Sunrise Recreation and Park District with the new city of Citrus Heights.

* * * *

Major Issues of Concern/Potential Problems

Depending largely upon the future outcome of the potentially critical unknown factors identified in the preceding section, the proposed incorporation could directly or indirectly cause a number of potential effects upon Sacramento County and other agencies which currently provide public service to the Citrus Heights area. These effects include the following:

1. Citrus Heights is currently a component in the aggregate of unincorporated suburban areas which are administered by Sacramento County. Since Citrus Heights contains a more intensive commercial tax base than most other unincorporated areas of the County, its exclusion from the unincorporated area tax base would likely diminish the overall levels of public services provided by the County to the remaining unincorporated areas, thus creating a burden and hardship for residents of those areas who may already consider the existing levels of service to be inadequate.

* * * *

[Volume II Administrative Record at 475, 477.]

[MEMORANDUM DATED MARCH 31, 1987]

For The Agenda Of:
March 31, 1987

To: Board of Supervisors

From: County Executive's Office

Subject: THE IMPACTS ON SACRAMENTO COUNTY OF THE INCORPORATION OF CITRUS HEIGHTS

* * * *

DISCUSSION:

The successful incorporation of Citrus Heights will require the County to transfer to the new city both the responsibility of providing certain municipal services and a variety of revenues. In addition, the incorporation will require cost shifts due to the reduction in discretionary funding sources. Due to the presence of regional shopping centers within the proposed city and inequitable state law governing the transfer of property taxes from a county to a newly incorporating city, Sacramento County stands to transfer some $4,746,000 more in revenue than in the costs of service responsibility to Citrus Heights. This loss will effect both the Unincorporated Area Services Fund (Fund 013), which finances the provision of services to the residents of the Unincorporated Area, and the General Fund (Fund 001), which finances the provision of Countywide services.

After incorporation the city of Citrus Heights would be responsible for providing the following services:

Police Protection	Traffic Enforcement
Road Construction and Maintenance	Planning and Land Use Control
Animal Control	Building Inspection
Public Works Engineering	

The County currently provides all of these services to Citrus Heights with the exception of traffic enforcement which is provided by the California Highway Patrol.

The additional services of local parks and recreation, street lighting, and storm drainage maintenance may or may not be provided by Citrus Heights.

We are recommending that your Board request LAFCO make minor adjustments in the proposed boundaries of the city to provide for more efficient and less confusing delivery of services to both the residents of Citrus Heights and the adjacent portions of the Unincorporated Area.

The following services (and their current costs) will be transferred to the new city from the County's Unincorporated Area Services and General Funds:

Service	County Cots
Police Protection	$3,289,459
Planning & Environmental Impact	321,464
Animal Control	207,021
Road Services	35,610*
TOTAL	$3,853,554

* This represents the amount of Unincorporated Area property tax levied for Road Services that will be transferred to the new city.

The following are estimates of discretionary revenues currently financing Unincorporated Area Services Fund and General Fund services which will also be transferred to the new city:

Revenue	Transfer to Citrus Heights
Sales Tax	$7,000,000
Property Tax	1,102,000
Cigarette Tax	274,784
Franchise Fees	105,000
Property Transfer Tax	77,000
HOPTR Subvention (from State)	41,000
TOTAL	$8,599,784

The impacts on the two funds may be summarized as follows:

Fund	Cost	Revenue	County Loss
Uninc. Area Services	$3,853,554	$7,379,784	$3,526,230
General	0	1,220,000	1,220,000
TOTAL	$5,168,727	$8,599,784	$4,746,230

The County loss includes a loss of financing estimated at $274,483 which currently supports services provided to the Unincorporated Area by the Auditor-Controller ($109,225); Personnel Management ($95,549); and County Executive ($69,709).

* * * *

[Volume II Administrative Record at 505-506.]

PROPOSAL FOR THE INCORPORATION OF CITRUS HEIGHTS FEASIBILITY ANALYSIS BY THE SACRAMENTO LOCAL AGENCY FORMATION COMMISSION STAFF

John S. O'Farrell, Executive Officer
SACRAMENTO LOCAL AGENCY FORMATION COMMISSION
700 H Street #7650
Sacramento, California 95814

* * * *

B. *Past Efforts/Significant Events*

* * * *

Over the nine years since that time, several events have occurred which impact new cities, the County and other affected local agencies. First and foremost, there is Proposition 13, which precludes new cities, or other local governmental agencies, from imposing additional *ad valorem* property taxes above 1% of valuation. This was not the case in 1978. The proposed City of Citrus Heights at that time needed additional property taxes for an economically viable entity and it was legally permissible to impose those additional property taxes. Today, one of the most significant consequences of Proposition 13 is that no additional *ad valorem* taxes are permitted; therefore, any new city property taxes must be extracted from other agencies serving the incorporation area; namely, the County and/or special districts.

Secondly, Proposition 4 (1979), the Gann Limitation, has made it difficult for some cities, counties and districts to spend tax money even if there is an abundance of revenue in the coffer. Proposition 4 requires that an appropriations, or "spending limit," be established for all public agencies in California. Again, this requirement did not exist in 1978. Thirdly, revenue sharing, once an important discretionary revenue source for cities and counties, has been abolished, effective fiscal year 1988-89.

Finally, Proposition 62, an initiative statute, was approved by the California electorate in November, 1986.

Proposition 62 requires all new "general" taxes to be approved by a majority of the electorate, and "special" taxes to be approved by a super-majority, or ⅔'s of the electorate. Proposition 62 has been interpreted to include the city's share of the local sales tax.

* * * *

SECTION III—ANALYSIS OF POTENTIAL IMPACTS

A. *Impact on Sacramento County Government*

The incorporation of Citrus Heights would relieve Sacramento County of some service responsibility and cost, but would also reduce the County's total revenue. Upon incorporation, certain services will be transferred to the new city of Citrus Heights. Those services will include police protection and traffic enforcement, planning and land use control, animal control, road construction and maintenance, building inspection and engineering services, including subdivision approval. These services will be transferred along with the revenues and fees linked to the services. In addition, the County of Sacramento provides services to the entire county, including the cities, such as health, welfare and specialized law and justice services (courts, district attorney, jails/correctional institutions, public defender). These services cannot be transferred to the new city, although the law requires that a portion of certain revenues that help to finance these services will be transferred to the new city. The objective of this Section is to determine the net impact of these changes on the County. This requires an examination of:

(a) The municipal-type services that the County presently furnishes to Citrus Heights and the existing cost of providing such services;

(b) The revenue that the County currently receives from the Citrus Heights area to support these

service costs and would lose as a result of incorporation;

(c) The present relationship between existing service costs and the estimated revenue loss; and

(d) The net fiscal impact of a Citrus Heights incorporation on Sacramento County and unincorporated area services.

The services provided by Sacramento County to Citrus Heights and the present cost of such services were described in Section II. The total estimated County and dependent district service expenditure, when subtracting the Highway Patrol Service costs, Refuse and the Sunrise Recreation and Park District expenditure, is $6,199,036.

The following table reiterates the County service costs.

Table 23

FY 85-86 County Service Costs to Citrus Heights

Planning/Land Use	$321,456
Sheriff's Patrol	3,289,459
Animal Control	207,021
Public Works	
Roads	1,155,000
Building Inspection	497,700
Engineering	98,000
Subdivision Development	76,000
Drainage	266,000
Lighting	288,400
Total	$6,199,036

The County offset this estimated 1985-86 service cost with the state and locally collected revenue it received from the Citrus Heights area. It is estimated that if the community of Citrus Heights had been incorporated in 1985-86, the County would have lost a total of $8,777,460 in state and locally collected revenue from Citrus Heights,

excluding County property taxes. When property taxes are included, the total is $9,789,396. (See table below.)

Table 24

County Revenues Generated to Offset
Citrus Heights Service Costs

Sales Tax	$6,496,290
Cigarette Tax	274,784
Gas Tax (2106)	150,000
Locally Collected	1,321,053
District Taxes	469,301
HOPTR	66,032
	8,777,460
County Property Tax	1,011,936*
	$9,789,396

A comparison of the total estimated 1985-86 County expenditure in Citrus Heights and the total estimated revenue loss indicates that in 1985-86 the County would have spent approximately $6,199,036 (Table 23) to provide services to Citrus Heights. To offset service cost, the County would have collected $8,777,460 (Table 23) in revenue other than County property tax. When the property tax is factored in, the difference between service costs and reevnues is $3,590,360 ($9,789,396-$6,199,036). *This is a key finding and indicates that the incorporation of Citrus Heights could have a potentially detrimenal effect on Sacramento County operations and the delivery of services to the remainder of the unincorporated area.*

The finding that incorporation could produce a significant revenue loss to the County of Sacramento provides the County with only two basic alternatives for reor-

* The County property tax *does not* offset municipal service cost to Citrus Heights; again, it finances countywide activities which are non-transferrable to a city.

ganizing operations and service provision. Alternative No. 1 would be to decrease the unincorporated area service expenditure in the amount of the existing expenditure in Citrus Heights. Alternative No. 2 would be to seek electoral approval of supplemental revenue to make up the Citrus Heights loss.

The following table presents the 1985-86 revenue that the City of Citrus Heights could have received and the projected revenue loss to Sacramento County. The difference between the two figures is $3,915,006. This is new revenue coming into the community. The Fund 013 loss is estimated at $7.5 million; the Fund 01 loss at $1.8 million. The District loss is approximately $0.5 million.

The County Executive's analysis of the impacts of the Citrus Heights incorporation is contained in the Appendix to this report. The County Executive's analysis translates the dollar loss into reduced unincorporated area services. For more information, please consult the County Executive's analysis.

Table 25

Estimated 1985-86 Fiscal Impact of Incorporation on Sacramento County

Revenue Source	Citrus Heights Revenue	County Estimated Loss
State Collected and/or Shared		
Sales and Use Tax	$6,496,290	$6,496,290
Cigarette Tax	274,784	274,784
Motor Vehicle In-Lieu Fees	2,597,175	-0-
Trailer Coach In-Lieu Fees	28,130	-0-
Off Highway Vehicle	2,137	-0-
Gas Tax Revenue	1,437,564	150,000
Subtotal	10,836,080	$6,921,074

Revenue Source	Citrus Heights Revenue		County Estimated Loss
Locally Raised and Collected			
Business License Tax	76,000		76,000
Franchise Tax	102,000		102,000
Property Transfer Tax	71,000		71,000
Fines and Forfeitures	293,250		293,250
Licenses, Permits, Charges	702,803		702,803
Subtotal	$1,245,053		$1,245,053
Property Taxes	1,637,279		1,637,279
Total	13,718,412		$9,803,406
Difference		$3,915,006	

* * * *

D. *Potential Impacts on Citrus Heights Taxpayers*

The proposed incorporation would not impact the property tax rate within the community. There would be no property tax increase directly related to the incorporation. Property taxes accruing to the new city would be shifted from Sacramento County and affected special districts.

Future actions by an elected city council in Citrus Heights could precipitate increases in some local option revenues but only with concurrence of a majority of the local electorate. This would include utility user taxes, transient occupancy (hotel/motel) taxes, and others, as discussed earlier in this report.

* * * *

G. *Why Incorporation?*

If Citrus Heights is successful in its endeavor to incorporate, it will represent the most fundamental change in Sacramento County governance since 1854 when the City of Sacramento was chartered. From a historical perspective, it is important because:

—The last successful incorporations occurred in 1946 (Folsom, Galt) and were inconsequential in terms of drastically changing the geometry of Sacramento County government.

—Since 1958, there have been six incorporation attempts in the northeast area, all of which have failed.

—The last major reorganization of any consequence occurred in 1964 when the City of Sacramento merged with the City of North Sacramento and the City of North Sacramento was dissolved.

—The last major inhabited annexation to the City of Sacramento took place in 1965.

From a fiscal perspective, it is important because incorporation will localize a disproportionately high share of the heretofore County sales tax that historically has been used to finance municipal services in the entire unincorporated area. From an organizational perspective, the incorporation of Citrus Heights is important because it represents a departure from a system of governance that has evolved, for the most part, over the last thirty years, which has relied heavily upon Sacramento County and a number of dependent and independent districts.

* * * *

[Volume III Administrative Record at 519, 536, 612, 613, 614, 615, 616, 629, 636.]

[MEMORANDUM DATED MAY 6, 1987]

May 6, 1987

TO: Sacramento Local Agency Formation Commission

FROM: John S. O'Farrell, Executive Officer

RE: Fiscal Impact of Shifting the Eastern Boundary of the Proposed City of Citrus Heights

On April 28, 1987, your Commission directed staff to report back on the fiscal impact of excluding the Sunrise Mall properties from the proposed city. Transmitted herewith is a very rough analysis of two alternative boundary modifications.

EXCLUDING THE SUNRISE MALL
(See Map No. 2)

The removal of the Sunrise Mall from the proposal area will reduce the sales tax and property tax accruing to the new city. Other revenues would also be reduced, but in very minor amounts. Service costs, theoretically, should also be reduced.

Approximation of Revenue Loss to the Proposed City of Citrus Heights

Sales Tax	$2,000,000
Property Tax Loss	
Based on Total Value of $47,187,832	37,750
	$2,037,750

Reduction in Service Cost

Sheriff	$149,272
Public Works	-0-
Planning	-0-
Animal Control	-0-
	$149,272
NET EFFECT	$1,888,478

EXCLUSION OF ALL TERRITORY EAST OF SUNRISE BOULEVARD
(See Map No. 1)

The deletion of residential and commercial properties east of Sunrise Boulevard from the prospective city will reduce potential sales taxes, state subventions (because of the reduction in population), locally collected revenues and the property tax accruing to the new city. Service costs will also be reduced.

Approximation of Revenue Loss

State Collecter/Shared	
Sales Tax	$2,250,000-2,500,000
Cigarette Tax	39,940
MVIL	74,039
Gas Tax-2107	25,920
Collier Uuruh-2106	14,640
TOIL	802
Off Highway	61
	$2,655,402
Locally Raised/Collected	
Business Licenses	
Franchise Fees	
Property Transfer Tax	
Fines/Forfeitures	
Planning/Building Fees	
	$25,000-$35,000
Property Taxes	
Based on Total Value of $172,511,313	138,000
Total	$2,828,402

Reduction in Service Cost

Sheriff	$252,756
Public Works	8,000
Planning	Negligible
Animal Control	Negligible
	$260,776
NET EFFECT	$2,567,626

CONCLUSION

Elimination of the Sunrise Mall properties from the proposal area would reduce the fiscal impact of incorporation on Sacramento County by approximately $1.9 million/year. The city could theoretically still have a surplus of $1.7 million/year in potential revenue over existing service costs.

Deletion of the block of territory bounded by Greenback on the north, Fair Oaks Boulevard on the east, Madison Avenue on the south, and Sunrise Boulevard on the west, would reduce the fiscal impact of incorporation on the County by approximately $2.5 million/year. The prospective city could still experience a $1.1 million surplus (excess revenue over expenditure) if this territory was deleted from the proposal area.

JSOF:Maf
Attachments
cc: Board of Supervisors
County Executive
C. David Hurst
Richard Wagner
John Angerer
Jean Duncan
Steve Baker
Diane Muro
Sheriff
Public Works
Animal Control

Planning
Administration and Finance Agency
Glen Coin
Doug Dempster
Larry Irby

[Volume XI Administrative Record at 1239-1242.]

[MEMORANDUM DATED MAY 24, 1988]

Timed Hearing: May 24, 1988
2:30 p.m.

To: Board of Supervisors

From: County Executive

Subject: SACRAMENTO COUNTY INCORPORATION POLICY

PREAMBLE

For many years, the incorporation of new cities was simply not an issue in Sacramento County. The last incorporation occurred in 1947. Only one local community in the Sacramento metropolitan area in the last 40 years has had the opportunity to express itself in a popular fashion on an incorporation question. That was Elk Grove, and the cityhood proposal was defeated by the local electorate in November 1987. Other than the recent interest in Elk Grove, Citrus Heights, Rancho Cordova, and Rio Linda-Elverta, there have been no serious attempts to form cities in this county since 1978.

Since 1978 there have been a number of fundamental changes in the philosophy of governance, the relationship of the levels of government, the property tax structure and fiscal consequences of organizational changes. The changes that have occurred in the last ten years have created a need to rethink the concept of incorporations and what it means to the total community.

The issues which became the hue and cry of incorporation opponents during recent hearings concerning incorporation have been a major concern to the County Executive's Office since the early 1980's. My staff has been pointing out the inequities of the laws governing new city formation since 1983. The County has sponsored legislation, beginning in 1984, to attempt to change the patent unfairness of revenue transfer provisions, free service provisions, and other adverse elements of contem-

porary incorporation law; as you are aware, without a great degree of success. This office has detailed the adverse fiscal impacts of the various incorporations on Sacramento County on numerous occasions. I have publicly espoused the view that additional cities are not in the best interests of the "total" community whenever I have been asked to comment on the subject.

This report coalesces my thoughts and concerns on the formation of new cities in Sacramento County. I continue to strongly believe that additional incorporations will disrupt the ability of the County and other existing agencies of local government to solve regional problems and would, under current law, have major adverse impacts on the County.

* * * *

The Citrus Heights Incorporation Proposal

Should the proposed incorporation of Citrus Heights ever be approved by the voters, the County would suffer a growing loss of several discretionary revenues including sales tax, property tax, and other revenue. Even with LAFCO's removal of Sunrise Mall from the proposed city, the first full year *net loss* to Sacramento County may approach $2.5 million. In current dollars, the eventual annual net loss to the County will be approximately $3.7 million upon the completion of the phased property tax transfer. The cumulative loss over a ten-year period would range from $35,000,000 to $40,000,000.

The following table summarizes the first-year impact on the county's General Fund and Fund 013 should the Ctirus Heights incorporation occur. Bear in mind the fiscal impact of incorporation is ongoing and escalates over time as the revenue base grows.

IMPACT ON SACRAMENTO COUNTY
OF CITRUS HEIGHTS INCORPORATION

	First-Year Impact
Revenue Transferred:	
Sales Tax	$4,750,000
Property Tax	964,000
Other Revenue	468,000
Total	$6,182,000
Cost of Services Transferred	$3,593,000
Total County Loss:	$2,589,000
General Fund Loss	1,067,000
Fund 013 Loss	1,522,000

The first-year General Fund loss of approximately $1.0 million represents the transfer of property tax and some other revenue with no service responsibility transfer (see Appendix A). The first-year property tax loss is slightly less than half of the total annual property tax transfer at the end of the transfer period. There would also be a transfer of unincorporated area service responsibility, but the sales tax and other revenue transferred would exceed the service costs by some $1.5 million. The patent unfairness of the incorporation revenue transfer laws which results in the large loss of discretionary financing which also supports underfinanced programs is the primary reason why the Board of Supervisors and others eventually opposed the Citrus Heights incorporation proposal.

* * * *

[Volume XI Administrative Record at 3303-3309.]

RESOLUTION NO. LAFCO 962B

RESOLUTION OF THE SACRAMENTO LOCAL AGENCY FORMATION COMMISSION APPROVING THE CITRUS HEIGHTS INCORPORATION PROPOSAL (A REORGANIZATION) (LAFCO PROCEEDING NO. 29-86)

As used in this Resolution, the following terms shall mean:

"City of Citrus Heights" is the general law city proposed in the Proposal.

"Commision" is the Sacramento Local Agency Formation Commission.

"County" is the County of Sacramento.

"Executive Officer" is the Executive Officer of the Commission.

"Petition" is the original petition containing 11,979 signatures for the incorporation of the Subject Territory and additional territory.

"Proposal" is the incorporation of the Subject Territory into a general law city.

"Subject Territory" is the area described in Exhibit A and shown on Exhibit B (Map) which are attached hereto and by this reference incorporated herein. In the event of any conflict between Exhibit A and Exhibit B, Exhibit A shall control.

WHEREAS, on October 14, 1986, the Petition was submitted to the Commission pursuant ot the Cortese-Knox Local Government Reorganization Act of 1985; and

WHEREAS, on November 13, 1986, the Executive Officer submitted the Petition to the Registrar of Voters of the County for verification that sufficient registered voters within the applicable area signed the Petition and

the Registrar of Voters of the County found that 8,848 valid signatures were affixed to the Petition, and, that said signatures exceeded the twenty-five percent threshold required by law; and

WHEREAS, the Executive Officer has examined the Petition and executed his Certificate of Sufficiency in accordance with law; and

WHEREAS, at the times and in the form and manner provided by law, the Executive Officer set the Petition for public hearing by the Commission and gave notice thereof; and

WHEREAS, public hearings on the Petition were held by the Commission on April 14, 1987, April 28, 1987, May 12, 1987, and May 26, 1987; and

WHEREAS, the Commision adopted Resolution 960 on May 26, 1987, approving the Petition.

WHEREAS, public hearings on Applications for Reconsideration of Resolution 960, pursuant to Government Code Section 56857, were held by the Commission on June 30, 1987 and July 6, 1987; and

WHEREAS, the Commission adopted Resolution 962 on July 7, 1987, which action approved in part and denied in part the above-mentioned Applications for Reconsideration by reducing the size of the proposed City of Citrus Heights to the Subject Territory so as to mitigate the financial impact upon the County; and

WHEREAS, the language of Resolution 962 did not correctly memoralize the Commission's intent or action with regard to the transfer of the City's share of secured and unsecured property taxes commencing in the fiscal year in which the incorporation of the City of Citrus Heights becomes effective; and

WHEREAS, the Commission's intent and action was to incorporate the agreement on the manner of effecting

the transfer of the City's share of secured and unsecured property taxes which had been negotiated by representatives of the County of Sacramento and approved by the Sacramento County Board of Supervisors in August, 1986; and

WHEREAS, the Commision, pursuant to Government Code 56854, adopted Resolution 962A on November 30, 1987, as a purported correction of a clerical error in Resolution 962; and

WHEREAS, public hearings on three (3) Applications for Reconsideration of Resolution 962 and Resolution 962A were held by the Commisison on February 11, 1988, and March 2, 1988; and

WHEREAS, the Executive Officer has reviewed all available information and prepared reports, including recommendations, and presented the filings, reports and related information to the Commission, which were then considered by the Commission; and

WHEREAS, at the February 11, 1988, and March 2, 1988, public hearings the Commission heard and received all oral and written protests, objections, requests for reconsideration and all oral and written evidence which was made, presented, or filed, and persons present were given an opportunity to hear and be heard in respect to any matter relating to these hearings; and

WHEREAS, the delays in concluding the incorporation process subsequent to the adoption of Resolution 962 have extended beyond the operative dates set forth in the Resolution and thereby causing the dates to be moot and inoperative, which would require the terms of Resolution 962 to be construed and interpreted by judicial proceedings in order to determine the effective dates in the event of an affirmative vote on the incorporation resolution, and which could confuse the electorate in their consideration of the merits of the incorporation proposal; and

WHEREAS, in the public interest and the avoidance of further delay and the expense of judicial proceedings, the Commission desires that dates consistent with its original intent in the adoption of Resolution 962 should be set forth in the incorporation resolution; and

WHEREAS, the Commission has determined to approve in part and deny in part the three (3) Applications for Reconsideration currently before it by adopting this Resolution 962B to update, clarify ambiguities, correct and further specify the provisions of Resolution 962 and 962A.

NOW, THEREFORE, the Sacramento Local Agency Formation Commission does hereby find, determine, resolve and order as follows:

1. a. Pursuant to Government Code Section 56842, the Commission has determined that the amount of property tax revenue to be transferred shall be as set forth in Section 7e herein.

   b. The Commission finds that the County is a county in which prior to adoption of Article XIIIA of the California Constitution, a separate fund was established consistent with Government Code Section 56842(c)(4);

   c. The Commission has considered the total amount of revenue from all sources available to the proposed City of Citrus Heights;

   d. The Commission has considered the fiscal impact of the transfer of property tax revenue on the County;

   e. Based on information presented by the County, there will be fiscal impact on the County amounting to the loss of less than one percent (1%) of the total discretionary and nondiscretionary revenues of the County. In terms of

discretionary revenue (defined as property tax, sales tax, cigarette tax, franchises, real estate, transfer tax, homeowner's property tax relief payments, and motor vehicle in lieu fees), there will be a fiscal impact on the County amounting to the loss of three and one-third percent (3.33%) of the total discretionary revenue of the County. The distribution of this loss between services and capital expenditures is a policy question for the Board of Supervisors of the County to address.

f. Consequently, the Commission finds that based on the above and on all relevant facts submitted by the County that immediate transfer of property tax revenues would be burdensome to the County;

g. The Commission finds, pursuant to Government Code Section 56842(c)(4), that the transfer of property tax revenues to the City of Citrus Heights shall be phased over a period not to exceed twelve (12) years following the effective date of its incorporation as set forth in Section 7e of this Resolution.

h. The Commission hereby also finds that the County should not be required to provide services to the City of Citrus Heights without reimbursement notwithstanding the provisions of the Cortese-Knox Government Reorganization Act and therefore the Commission finds that the City of Citrus Heights shall be required to reimburse sales tax to the County as set forth in Section 7f of this Resolution.

i. The condition imposed by this Resolution regarding the phased implementation of the transfer of property tax revenues and the condition imposed by this Resolution regarding the reim-

bursement of sales taxes collected in the partial fiscal year following enactment of a sales tax ordinance by the City of Citrus Heights partially mitigate the fiscal impact on the County resulting from the incorporation of the City of Citrus Heights.

j. The Commission has considered all relevant factors set forth in Government Code Section 56841 and all other relevant factors in reaching its conclusions regarding the Proposal.

2. Notice regarding the Proposal has been given as required by law.

3. The Subject Territory is inhabited.

4. a. The Environmental Impact Section of the Planning Department of the County conducted an initial study of the Petition in accordance with the California Environmental Quality Act and published and circulated a "Notice of Intent to Prepare a Negative Declaration" to fifty-five (55) agencies, including the County. All written and oral comments received during the comment period supported preparation of a Negative Declaration. During the comment period, no objections to a Negative Declaration were filed. It was determined from the initial study that the Petition would have no potential to generate significant adverse impacts involving physical changes to the environment and that a Negative Declaration was the appropriate environmental document for processing the Petition. The Commission adopted Resolution 962 on July 6, 1987, certified the Negative Declaration and filed a Notice of Determination on July 15, 1987. There was no legal challenge to the filing of the Notice of Determination certifying a Negative Declaration for the Proposal.

b. On November 30, 1987, the Commission adopted Resolution 962A to modify Resolution 962 so as to accurately reflect the intent of the Commission in adopting Resolution 962. On December 7, 1987, Applications for Reconsideration from Sacramentans to Save Our Services and the Sacramento County Deputy Sheriffs Association were received by the Executive Officer. On December 15, 1987, an Application for Reconsideration from the County was received by the Executive Officer. The Commission has determined to approve in part and deny in part these Applications for Reconsideration. By adopting this Resolution, the Commission is amending Resolution 962 (i) to modify the readopt Resolution 962A, (ii) to make clarifying changes to Resolution 962, and (iii) to incorporate findings as required by law. These amendments to Resolution 962 do not require preparation of an Environmental Impact Report under the California Environment Quality Act nor do they require recirculation of the Negative Declaration. The Executive Officer is directed to refile with the Clerk of the County, a Notice of Determination pursuant to the California Environmental Quality Act. These actions as set forth in this Section 4 are based on the record of these proceedings and the Commission Resolution adopted concurrently herewith.

5. The Proposal is found to be financially feasible and will result in the following:

   a. The Proposal will increase local control over and accountability for decisions affecting the Subject Territory by having an elected city council which will serve as the community's local governmental representatives for the Subject Territory.

   b. Revenues generated within the Subject Territory will be spent within the Subject Territory

to pay for programs and services for residents of the Subject Territory;

c. There will be an increase in the allocation of federal and state revenues to the Subject Territory to pay for programs and services for residents of the Subject Territory;

d. There will be an opportunity for increased citizen participation and involvement in the local and civil affairs of the Subject Territory.

6. The election on the incorporation of the City of Citrus Heights (hereinafter "election") shall be held within the Subject Territory and shall be called and held on the next regular election date occurring at least eight-eight [sic] (88) days after the date upon which the Board of Supervisors of the County, as the Conducting Authority, adopts a resolution calling the election.

7. Subject to the conditions set forth below and to confirmation by the voters, the Proposal is approved as follows:

a. The Subject Territory is incorporated into a new general law city.

b. The name of this general law city shall be the City of Citrus Heights.

c. The boundaries of the City of Citrus Heights shall be the Subject Territory.

d. The City of Citrus Heights shall assume drainage and lighting service responsibilities from the Metropolitan Storm Drainage Maintenance District, Sacramento County Street Lighting Maintenance District, and County Service Area No. 1.

e. The following property tax condition is hereby made a condition to the approval of the Proposal:

(1) As used in this subsection e, the following terms shall mean:

(i) "Secured and Unsecured Property Taxes" are the one percent (1%) assessment upon real property and the general tax levies upon personal property pursuant to the Revenue and Taxation Code but shall exclude all assessments levied for the service of indebtedness.

(ii) "Preincorporation Taxes" are all Secured and Unsecured Property Taxes allocated to the County with respect to property located in the Subject Territory for the fiscal year immediately preceding the fiscal year in which the incorporation of the City of Citrus Heights becomes effective.

(iii) "Postincorporation Taxes" are all Secured and Unsecured Property Taxes allocable to the County and the City of Citrus Heights with respect to property located in the Subject Territory for a given fiscal year.

(2) The City of Citrus Heights shall be entitled to receive Secure and Unsecured Property Taxes computed as set forth below.

(i) For the fiscal year in which the incorporation of the City of Citrus Heights becomes effective twelve and twelve one-hundreths (12.12%) of the amount fo Preincorporation Taxes shall be allocated to and, when collected, apportioned to the City of Citrus Heights. This amount is approximately 4.85% of all Secured and Unsecured Property Taxes levied in the Subject Territory. If the fiscal year in which the incorporation of the City of Citrus Heights becomes effective is a partial year, the amount allocated to and when collected apportioned to

the City of Citrus Heights shall be prorated accordingly.

(ii) For the fiscal year following the fiscal year in which the incorporation of the City of Citrus Heights becomes effective, the sum of the following shall be allocated to, and when collected, apportioned to the City of Citrus Heights:

(x) Twelve and Twelve one-hundredths Percent (12.12%) of the Postincorporation Taxes for the subject fiscal year; and

(y) Thirty Percent (30%) of the product of:

(a) eighty seven and eighty-eight one hundredths percent (87.88%); and

(b) the amount by which Postincorporation Taxes for the subject fiscal year increased over Postincorporation Taxes for the preceding fiscal year;

(iii) Beginning in the second fiscal year following the fiscal year which the incorporation of the City of Citrus Heights becomes effective, and each fiscal year thereafter, the sum of the following shall be allocated to, and when collected, apportioned to the City of Citrus Heights:

(x) The amount of Postincorporation Taxes during the subject fiscal year multiplied by the percentage of such taxes allocated to the City of Citrus Heights during the prior fiscal year; and

(y) Thirty Percent (30%) of the product of:

(a) The percentage of Postincorporation Taxes which were allocated to the County for the preceding fiscal year; and

(b) The amount by which Postincorporation Taxes for the subject fiscal year increased over Postincorporation Taxes for the preceding fiscal year.

(iv) Notwithstanding paragraphs (i), (ii) and (iii) above, in no event shall more than twelve percent (12%) of all Secured and Unsecured Property Taxes assessed within Subject Territory be allocated to the City of Citrus Heights for any fiscal year.

(v) Beginning in the twelfth (12th) full fiscal year following the fiscal year in which the incorporation of the City of Citrus Heights becomes effective, the provisions of paragraphs (i), (ii), and (iii) above shall terminate and during said twelfth (12th) fiscal year, and during each fiscal year thereafter, twelve percent (12%) of the Secured and Unsecured Property Taxes assessed with respect to property located in the Subject Territory shall be allocated to, and when collected, apportioned to the City of Citrus Heights.

(vi) In addition to the allocation set forth above in this subsection 7e, the City of Citrus Heights shall be entitled to receive its proportionate share of any supplemental taxes collected in any fiscal year after the year in which the incorporation of the City of Citrus Heights becomes effective.

(3) This subsection 7e is adopted pursuant to Government Code Section 56842(c)(4).

(4) Attached hereto as Exhibit C-1 and C-2 and incorporated herein are two mathematical methodologies for operation of the provisions of this subsection 7e.

f. The following sales tax condition is hereby made a condition to the approval of the Proposal:

(1) For purposes of this subsection 7f, the term "Sales Tax" shall mean all sales and use taxes levied pursuant to the Bradley-Burns Uniform Sales and Use Tax Law as set forth in Revenue and Taxation Code Sections 7200 *et seq.*, and accruing to the City of Citrus Heights during the remaining portion of the fiscal year following the date on which the incorporation of the City of Citrus Heights becomes effective.

(2) The amount of Sales Tax, if any, shall be repaid to the County in accordance with the following terms:

(i) The amount of Sales Tax shall be determined by the State Board of Equalization which determination shall be conclusive;

(ii) The Sales Tax shall be repaid in equal quarterly installments beginning on the date which is six (6) months following the date of enactment of a sales tax ordinance by the City of Citrus Heights pursuant to the provisions of Bradley-Burns Uniform Local Sales and Use Tax Law, Revenue and Taxation Code Section 7200 *et seq.*, and ending on the date which is fifty-four (54) months following the date of enactment of said sales tax ordinance by the City of Citrus Heights;

(iii) Interest shall be computed on the unpaid balance of Sales Tax payable to the County

pursuant to subparagraph 7f at the pooled rate established from time to time by the County Treasurer of the County; provided that no interest shall accrue or be paid if the amount payable to the County pursuant to this subsection 7f is repaid on or before the end of the third (3rd) fiscal year following the fiscal year in which the incorporation of the City of Citrus Heights becomes effective.

(iv) Interest, if any, shall be added to each quarterly installment due and payable after the end of the third fiscal year following the fiscal year in which the incorporation of the City of Citrus Heights becomes effective;

(v) If the City of Citrus Heights fails to repay any amount when due, the County may, at its option, at any time before the City of Citrus Heights repays such amount, declare the whole amount then owing immediately due and payable.

(vi) The City of Citrus Heights may prepay all or any portion of the Sales Tax at any time without penalty.

g. If the Proposal is approved by the voters at the confirming election, the effective date of the incorporation of the City of Citrus Heights shall be the last day of the month in which the election occurs.

h. The City Council of the City of Citrus Heights shall consist of five members elected at large from throughout the Subject Territory. Terms of office for the members of the City Council of the City of Citrus Heights shall be in accordance with Government Code Sections 57377 and 57379. In addition to all other means authorized

by law, the first meeting of the City Council of the City of Citrus Heights may be called by notice given by any three of the members of the City Council of the City of Citrus Heights in the lawful manner.

i. Pursuant to Government Code Section 57376, the City Council of the City of Citrus Heights shall, immediately following its organization and prior to performing any other official acts, adopt an ordinance providing that all county ordinances and special district codes theretofore applicable shall remain in full force and effect as ordinances of the City of Citrus Heights for a period of 120 days after incorporation, or until the City Council has enacted ordinances superseding the County ordinances, whichever occurs first.

j. The City of Citrus Heights shall adopt the city manager/council form of organization and the City Council of the City of Citrus Heights shall fill the positions of city manager, city clerk, and city treasurer by appointment.

k. Pursuant to Government Code Section 57384, the County shall for the remainder of the fiscal year during which incorporation occurs or until the new City Council of the City of Citrus Heights requests discontinuance of the services(s), whichever first occurs, provide to the City of Citrus Heights all services furnished to the Subject Territory prior to incorporation of the City of Citrus Heights and shall be compensated for said services as set forth in subsection 7f of this Resolution. If the City of Citrus Heights desires any additional services, it shall be at the sole and absolute discretion of the County whether to provide such services and to

determine the terms of reimbursement for same.

l. The appropriation limit of the City of Citrus Heights, as required by Article XIIIB of the California Constitution for the fiscal year of incorporation, shall be $18,000,000. Such appropriations limit shall be placed before the electorate for confirmation and approval by a majority vote as part of the ballot proposition for the proposed reorganization (California Constitution, Article XIII B, Section 4).

m. The City of Citrus Heights shall be authorized to continue to levy as general taxes of the City of Citrus Heights those general taxes from time to time levied by the County. The types, rates, and method of collection of such general taxes shall be as follows:

(1) A sales and use tax at the rate of one percent (1%) (or such other rate as is permitted by law) of the retail sale or use of tangible personal property within the City of Citrus Heights which shall be collected under contract by the State Board of Equalization and returned to the City of Citrus Heights pursuant to applicable law;

(2) A transient occupany tax at the rate of ten percent (10%) (or such other rate as is permitted by law) of the gross rental receipts of hotels and motels within the City of Citrus Heights to be collected by the hotel or motel operator and returned to the City of Citrus Heights pursuant to local ordinance;

(3) A real property transfer tax at the rate of $0.275 per $500 (or such other rate as is permitted by law) of value upon the sale of real property within the City of Citrus

Heights to be collected by the County and returned to the City of Citrus Heights pursuant to local ordinance;

(4) A business license tax at the rate presently levied by the County (or such other rate as is permitted by law) by the County to be collected by the City of Citrus Heights pursuant to local ordinance; and

(5) All other general taxes presently imposed by the County at the same rate as imposed by the County (or such other rate as is permitted by law) to be collected by their same method of collection as used by the County.

8. The question of the incorporation of the City of Citrus Heights, including all terms and conditions, shall be one question on the ballot.

9. The question of whether members of the City Council of the City of Citrus Heights in future elections are to be elected by district or at large may be a separate question on a subsequent ballot.

10. The Board of Supervisors of the County shall be the Conducting Authority and shall initiate proceedings for the incorporation of the City of Citrus Heights in compliance with Government Code Section 57025 *et seq.*

11. The County shall not make any changes in the Subject Territory, nor shall it impose any new conditions or modify any conditions imposed in this Resolution unless and until it receives prior written approval from the Commision for such changes, modifications or conditions.

12. The County shall provide the Executive Officer with a copy of the resolution calling the hearing and a copy of the resolution indicating final dis-

position of the Proposal which indicates full compliance with this resolution.

13. Any prior action by the Commission which is inconsistent with this Resolution is repealed to the extent of such inconsistency.

14. The Executive Officer is further instructed to:

    a. Mail a certified copy of this resolution to the affected governmental agencies;

    b. File a certified copy of this resolution with the Clerk of the Board of Supervisors of the County; and

    c. Request the County Surveyor to prepare the official legal description of the Subject Territory to be filed with the Clerk of the Commission.

PASSED AND ADOPTED BY THE SACRAMENTO LOCAL AGENGY FORMATION COMMISSION on the 28th day of March, 1988, by the following vote, to wit:

AYES: *Commissioners R. Tomson, H. Bartholomew, R. Chamberlain, G. Hannaford.*

NOES: *Commissioners G. Johnson, I. Collin, T. Kastanis.*

ABSENT: *None*

ABSTAINING:

/s/ George E. "Bud" Hannaford
GEORGE E. BUD HANNAFORD,
Chairman
SACRAMENTO LOCAL AGENCY
FORMATION COMMISSION

ATTEST:

/s/ Marilyn Ann Flemmer
MARILYN ANN FLEMMER
Commission Clerk

[Volume XI Administrative Record at 3256-3275.]

Supreme Court, U.S.
FILED
FEB 24 1993
OFFICE OF THE CLERK

No. 92-1313

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Petitioner,

v.

SACRAMENTO COUNTY LOCAL AGENCY
FORMATION COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does California Government Code § 57103—which provides that voters residing within the boundaries of a proposed city are the ones to vote on the question of whether the new city shall be formed—violate the equal protection clause of the fourteenth amendment?

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IN THE

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OCTOBER TERM, 1992

No. 92-1313

SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Petitioner,

v.

SACRAMENTO COUNTY LOCAL AGENCY FORMATION COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 29.1, Respondent Citrus Heights Incorporation Project informs the Court that it is a non-profit California corporation with no affiliated entities. The Petition in this case contains a lengthy "Statement of the Case." Petition at 3-12. Much of what is contained in this statement is irrelevant to the merits of the Petition, and some of it is inaccurate. A more concise and accurate statement of the case appears at the beginning of the unanimous opinion of the California Supreme Court holding California Government

Code Section 57103 constitutional. App. to Cert. at 1a-10a.

Respondent agrees with the California Supreme Court's summary, and pursuant to Supreme Court Rule 24.2, wishes to highlight two specific disagreements with Petitioner's statement of the case. First, as Petitioner points out, under California law, the incorporation of a new city requires the approval of the incorporation by a supra-local body called a Local Agency Formation Commission (hereafter "LAFCO") *prior* to the submission of the question of incorporation to the electorate. Petition at 3-4. Sacramento County, like all other California counties, has a LAFCO. Petition at 4-5. And, as Petitioner notes, LAFCOs have "broad authority" to notify or disapprove unsatisfactory incorporation proposals. Petition at 4-5.

There are several salient omissions from Petitioner's recitation. As the California Supreme Court noted, Sacramento County is one of only four counties to have a larger, seven-member LAFCO. App. to Cert. at 6a. Two of the LAFCO members represent the County, two represent existing Sacramento County cities, two others come from other governmental units in the County, and one other is a member of the general public appointed by the other six. App. to Cert. at 6a. LAFCOs have limited discretion in approving incorporation petitions. Before a LAFCO does so, it must conduct a comprehensive fiscal analysis of the proposed incorporation, consider public hearing testimony and otherwise consider "a multitude of factors." App. to Cert. at 7a-8a. One of these factors is "the effect of the proposed action . . . on adjacent areas." App. to Cert. at 8a.

At trial, one of the Petitioner's claims was that LAFCO abused its discretion by failing to consider these statutory criteria, including—of importance here—an asserted failue to consider the financial impact of the Citrus Heights Incorporation on other county residents. The

trial court, after considering the evidence, ruled against the Petitioner on this point stating:

> the Court has examined the question of whether or not there was any abuse of discretion for failure to preserve revenue neutrality in this matter. And the Court is satisfied that there is evidence insufficient for that purpose. App. to Cert. at 81a.

This portion of the judgment, including this finding, was not appealed. App. to Cert. at 29a (describing appellate posture of the case).

As will appear, this is a matter of no small consequence. Petitioner is desperate to portray the citizens of the rest of Sacramento County as "fenced out" of the incorporation process to their detriment. Petition at 28. But a more complete recitation reveals that LAFCOs are charged with protecting the interests of other county residents and that there is, in this case, an unchallenged judicial determination that LAFCO fulfilled its role. Thus, while Petitioner is anxious to focus solely on the election, this focus is misplaced. As the California Supreme Court put the matter:

> the voters' role under [California law] is rather like that of the masons who place a keystone at the apex of a high and intricate arch. The voters' approval is an essential piece, but as we have shown, by the time the question reaches the electorate the incorporation proposal will have undergone a labyrinthine process containing elaborate safeguards designed to protect the political and economic interests of affected local governments, residents and landowners. App. to Cert. at 10a.

CHIP's second major point of disagreement centers on Petitioner's representations of the fiscal impact of the incorporation proposal. Petitioner quotes a figure of a total impact of about $3.7 million, although it notes in a footnote that this figure in error since it comes *not* from the proposal that LAFCO actually approved, but from an earlier version. Petition at 6. As the California Supreme

Court suggested, it is doubtful that the specific fiscal projections are of constitutional consequence. App. to Cert. at 23a. But it nonetheless bears pointing out that Petitioner's figure is purely fictional. Reviewing the record, a unanimous California Supreme Court found that "the facts of this case do not belie any unusual financial detriment." App. to Cert. at 23a. The California high court further found that the impact amounted to about $5 per county resident annually, and was less than 1% of the Sacramento County budget, even using Petitioner's figures. App. to Cert. at 23a-24a. Petitioner does not attempt to demonstrate that the California Supreme Court's findings are in error, nor could it do so.

SUMMARY OF ARGUMENT

California Government Code § 57103 provides that in elections regarding the creation of a new city the residents of the proposed city vote on the matter. Petitioner asserts that this common-sense arrangement violates the equal protection clause, but it clearly does not. The decisions of this Court that bear on this matter are *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978). *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977) and *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). *Holt*, *Lockport* and *Hunter* make clear that a State's decision to draw voting lines along municipal lines merits only deferential "rational basis" review. The California statute obviously survives such review and Petitioner does not contend otherwise.

None of the decisions cited by Petitioner involve geographic limitations. They all involve limitations of the franchise on such bases as race and property ownership. In fact, the case that Petitioner specifically claims is in "conflict" with the persuasive and unanimous opinion of the California Supreme Court below actually involves a limitation of the franchise to persons not employees of the military.

The opinion of the California Supreme Court is consistent with the decisions of other courts. There is no conflict in the authority. In fact, 32 states have statutes functionally identical to California's, so that is no conflict in State practice. The writ should be denied.

ARGUMENT

The Petition is long on generalities, short on specifics. This is understandable, because Petitioner has no authorities even remotely analogous to this case to support its remarkable assertion that the California incorporation statute is unconstitutional. Petitioner's argument was rejected by a unanimous California Supreme Court, is foreclosed by the decisions of this Court and finds no support in either lower court opinions or the practices of the other States.

I. DECISIONS OF THIS COURT DEMONSTRATE THE STATUTE'S CONSTITUTIONALITY

Perhaps the best indication of the weakness of Petitioner's legal argument is its asserted justification for granting the writ. Petitioner asserts that the writ should be granted because the California Supreme Court's decision "is in conflict with this Court's opinion in *Carrington v. Rash*, 380 U.S. 89 (1965)." Petition at 12. From this, the uninitiated reader might anticipate that *Carrington* deals with a factual situation similar to the one at hand here. But, as it turns out, *Carrington* has little, if anything, to do with this case.

Carrington dealt with a Texas state law discriminating against military personnel with regard to voting eligibility. The rather bizarre—or at least "unique," *id.* at 91—Texas provision provided that a person must retain his or voting domicile on entry into military service until termination of the relationship with the service. *Id.* at 91-92. This Court held that this was unconstitu-

tional discrimination against those who wear "the uniform of our country." *Id.* at 97.

Carrington has nothing to do with this case. This Court did not purport to question the legitimacy of geographical limitations on voting. Quite to the contrary, the *Carrington* majority stated: "We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote *be bona fide residents of the community.*" *Id.* at 93-94 (emphasis added). This, of course, is what the California statute does. In common-sense fashion, it provides that those who vote on whether a community is to become is to become a city "be bona fide residents of the community." It makes no restrictions. It does not discriminate against military personnel or any other class of adult citizens. And contrary to the Petition's outlandish assertion, the California statute certainly does not discriminate against voters "on the basis of how they may vote." Petition at i.

Having disposed of the case that Petitioner evidently regards as the primary support for its position, let us turn to this Court's decisions that actually relate to the case at hand. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978) involved an Alabama statute giving "police jurisdiction" to incorporated cities extending three miles beyond their boundaries. This statute gave Alabama cities a wide array of powers beyond their borders, including enforcement of police and sanitary restrictions, business and professional restrictions, and extension of the city's criminal court jurisdiction. *Id.* at 60-61. Additionally, the Alabama statute allowed the cities to collect license fees from the borderland residents up to 50% of the normal amount. *Id.* at 62.

The borderland residents sued, claiming that the Alabama statute violated equal protection by denying them the right to vote in municipal elections. This Court rejected the constitutional challenge. This Court empha-

sized that it has upheld constitutional challenges to voting schemes only if they "deny the franchise to individuals who were physically resident with the geographical boundaries of the governmental entity concerned." *Id.* at 68. But, as this Court held, the Alabama statute did no such thing. The majority noted that municipal activities almost inevitably have influence beyond their borders. *Id.* at 69. "Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about." *Id.*

These "indirect extraterritorial effects," *id.* at 70, were insufficient to bring the borderland residents within the presumptive franchise of municipal elections. As long as the "line . . . coincides with the geographical boundary of the governmental unit at issue" the majority concluded that only "rational basis" review was indicated, and rejected the constitutional attack under that standard. *Id.* at 70-75.

Petitioner is understandably reluctant to deal with *Holt* and thus mentions it only in passing. Petition at 8, 21, 25. But if the challenge to the Alabama scheme failed, it is impossible to see how this challenge can succeed. In contrast to the substantial effects of the Alabama statute—financial and otherwise—the effect of incorporation on residents of the rest of unincorporated Sacremento County is at most financial, and, as the California Supreme Court found, slight and "not . . . unusual." App. to Cert. at 23a-24a. Moreover, the California statute goes to great lengths to protect the interests of non-residents, lengths not pursued in the Alabama statute. As noted above, before any incorporation proposal goes to ballot it must be approved by a LAFCO. LAFCOs must consider effects, financial and otherwise, on non-residents, and counties are heavily represented on LAFCOs, and especially so on the Sacramento County LAFCO. There is an unchallenged judicial

finding that LAFCO performed its statutory duties in this case.

Holt thus makes two things perfectly clear. The first is that geographical restrictions on voting that follow municipal lines are subject only to rational basis review; the second is that voting schemes that do not exclude any class of adults within those boundaries easily survive constitutional review. All of this makes obvious that the case for constitutionality here is even stronger than it was in *Holt*.

Holt was preceded by *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977). *Lockport* is fully consistent with *Holt*'s approach. In *Lockport* this Court considered an attack on a New York statute that required concurrent majorities of city and non-city dwellers to approve a change in county charters. The charter at issue was rejected by a narrow margin of the non-city dwellers but approved by a substantial majority of city dwellers and thus carried in the county as a whole. *Id.* at 262.

This Court concluded that there was no constitutional violation in New York's refusal to allow the charter to take effect. A unanimous court began its analysis by examining the threshold question of whether New York could justify the differing treatment of city and non-city dwellers. This Court concluded that the statute appropriately recognized that "the real and long-term impact of a restructuring of local government is felt quite differently by different county constituent units. . . ." *Id.* at 272. "The provisions of the New York law . . . do no more than recognize the realities of these substantially differing electoral interests. *Id.* Employing deferential review, this Court thus upheld the statute.

Just as the *Lockport* statute recognized differing interests, the California statute does too. The proposition that the interests of those within the borders of the proposed

city have a materially greater interest than those outside is too obvious for extended discussion. Those residing in the new city will feel the force of its regulatory authority and otherwise be subjected to its direct influence. This influence is of a different order of magnitude than the slight and "not . . . unusual," App. to Cert. at 23a-24a, financial effect outside the city's borders. As the California Supreme Court once noted: "It is the residents of a region . . . who as a class are most concerned with its government." *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 962, 501 P.2d 537, 104 Cal.Rptr. 297 (1972). The California statute does nothing more than recognize this truism. For those inside the new city's borders, the statute mandates an election before they can be subjected to the city's authority. For those outside the city, the statute protects them by requiring LAFCOs to consider their interests and mandating county representation on that body.

The lineal ancestor of both *Lockport* and *Holt* is *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). At issue in *Hunter* was a Pennsylvania statute allowing a consolidation of the cities of Pittsburgh and Allegheny upon a combined majority vote in the two cities. Consolidation passed in Pittsburgh, lost in Allegheny, but carried overall. This Court sustained the consolidation against constitutional attack, stating that municipal powers rest in "the absolute discretion of the State" and that a State may "at its pleasure modify or withdraw all such powers." *Id.* at 178.

It is doubtless true, as the California high court recognized here, that this language in *Hunter* "bespeaks the judicial confidence of a simpler era." App. to Cert. at 14a. But it is equally clear that this Court continues to find *Hunter* instructive in the equal protection context. In *Holt*, for instance, the majority noted that although the *Hunter* language quoted above had been qualified by later cases, "the case continues to have substantial con-

stitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Id.* at 71.

The simple message of *Holt*, *Lockport* and *Hunter*—a message that Petitioner tries mightily not to hear—is that drawing the limits of the franchise along municipal lines suggests no constitutional violation and triggers only minimal scrutiny under the equal protection clause. This Court has given States great, and appropriate, deference in formulating their internal workings.

None of the cases that Petitioner cites undercut this tradition of deferential review. In fact, aside from *Holt*, *Lockport* and *Hunter*, none of the cases that Petitioner discusses even deal with geographical restrictions on a voting franchise. *Carrington*, *supra*, 380 U.S. 89, as noted above, dealt with discrimination against persons employed by the military. *Phoenix v. Kolodziejski*, 399 U.S. 201 (1970) and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) both dealt with a restriction of the franchise to real property taxpayers in revenue bond elections. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) dealt with a redrawing of municipal borders in such a way as to intentionally exclude African-American voters. *Kramer v. Union Free School District*, 395 U.S. 621 (1969) dealt with a limitation of the franchise to real property taxpayers and parents of schoolchildren in school elections. *Rosario v. Rockefeller*, 410 U.S. 752 (1972) and *Kusper v. Pontikes*, 414 U.S. 51 (1973) both dealt with State laws designed to "lock in" persons to a party affiliation for purposes of voting in primaries. *Evans v. Common*, 398 U.S. 419 (1969) dealt with a state statute forbidding patients at a federally-run mental hospital from voting.

The point is that all of these cases involve restrictions that exclude some class of adults *resident within* the

relevant boundaries from voting. In *Kramer* it was non-parents and non-real property taxpayers, in *Gomillion* it was African-Americans, in *Carrington* it was military personnel, and so on.

At the risk of repetition, the California statute does not work this way at all. It allows all adults—African-American and white, parents and singles, real property owners and non-owners—to vote as long as they live within the relevant borders. The statute simply recognizes that persons on different sides of municipal lines have differing interests, and *Lockport*, *Holt* and *Hunter* make clear that States are entitled to wide latitude in weighing those interests. California has chosen a rational approach in its scheme, and there is no reason to disturb this judgment. As this Court once observed, government "is the science of experiment." *Anderson v. Dunn*, 6 Wheat. 204, 226 (1821). Petitioner quite evidently does not find the California experiment to its liking, but there is no reason to believe it constitutionally infirm.

II. DECISIONS OF LOWER COURTS DEMONSTRATE THE STATUTE'S CONSTITUTIONALITY

The message of these cases is lost on Petitioner, but not on lower courts. A review of the decisions of lower courts facing similar issues reveals that they are in accord with the California Supreme Court's excellent opinion in this case.

In *St. Louis v. The City of Town and Country*, 590 F. Supp. 731 (E.D. Mo. 1984) the district court considered a situation exactly analogous to the one at hand here. Missouri law allowed for the annexation of unincorporated portions of the county to existing municipalities. Residents in the unincorporated and unannexed portion of the county sued claiming that the ensuing "loss of government revenue" to the county gave them the right to vote on annexation matters. *Id.* at 736. The district

court rejected this contention and upheld the voting scheme under rational basis review. *Id.* at 737.

In *Provance v. Shawnee Mission Unified School Dist. No. 512*, 231 Kan. 636, 648 P.2d 710 (1982), the Kansas Supreme Court considered and rejected an argument much like the one raised here by Petitioner. In *Provance* a Kansas statute required a vote on the issue of a school closing only within the geographical subdistrict in which the school was located. A resident of the school district, but not the subdistrict, challenged the statute arguing that the financial interdependence of the district necessitated a district-wide vote. Citing *Holt* and *Lockport*, the Kansas high court applied minimal scrutiny and rejected the challenge.

In *Moorman v. Wood*, 504 F. Supp. 467 (E.D. Ky. 1980) the district court faced a Kentucky statute that allowed only the residents of a de-annexing portion of a city to vote on whether to annex to another city. The district court upheld this statute against constitutional attack. The court employed rational basis review and expressly endorsed the right of the State to "experiment." *Id.* at 477. Nearly the same problem was faced by the Alabama Supreme Court when it considered whether the State could limit the franchise in an annexation election to the residents of the annexing area. *Givorns v. City of Valley*, 598 So. 2d 1338 (Ala. 1992). Citing *Holt*, the Alabama high court upheld the statute under the rational basis test. *Id.* at 1340.

At least three district courts have faced the question of whether the franchise on an annexation can be withheld from those in the annexed territory, thus effectively giving the city the right to "unilaterally" annex adjacent areas. All three decisions, one of which was summarily affirmed by this Court, employed deferential review and sustained the statutes against constitutional attack. *See Murphy v. Kansas City*, 347 F. Supp. 837 (W.D. Mo. 1972); *Thompson v. Whitley*, 344 F. Supp. 480 (E.D.

N.C. 1972); *Adams v. City of Colorado Springs*, 308 F. Supp. 1397 (D. Colo.), *aff'd*, 399 U.S. 901 (1970).

The message from the lower courts could not be clearer. Lower courts have understood *Holt*, *Lockport* and *Hunter* to mandate deferential review in circumstances like the case at hand. The California Supreme Court's unanimous opinion is in line with these decisions and this provides an additional reason to deny the writ.

III. STATE PRACTICE ALLOWS A CITY-WIDE VOTE

The uniform practice among the States is to allow only the residents of a proposed city, town or village to vote on the matter of its incorporation. In *Carrington*, *supra*, 380 U.S. 89, 91-92—the case relied upon so heavily by Petitioner—this Court referred to the "unique" nature of the Texas statute, and bolstered its analysis by a comparative review of other State practices. More recently, this Court has emphasized that the prevalence of a practice is a factor in assessing its constitutionality. *Cf. Burnham v. Superior Court*, 495 U.S. 604, 615 (1990) (continuing use "in a substantial number of the States" of the rule of in-state service to establish in personam jurisdiction is a factor tending to show its constitutionality); *id.* at 627 (White, J., concurring in part and concurring in the judgment) (in-state service is "so widely accepted throughout this country that I could not possibly strike it down"); *id.* at 658 (Stevens, J., concurring in the judgment) (wide acceptance of the practice a factor in making its validity an "easy case").

At least 32 States provide for incorporation elections. *All* of the 32 States—including, of course, California—limit the franchise to voters residing within the boundaries of the proposed municipality. *See* Ala. Code § 11-41-3 (franchise limited to those who have "resided within" the proposed boundaries for three months . . .); Alaska Stat. § 29.05.110 (voter must be "resident within" the proposed boundaries for 30 days); Ariz. Rev. Stat. Ann.

§ 9-101 ("only qualified electors of the community shall vote on the question"); Colo. Rev. Stat. § 31-2-102 (franchise extends to "all the registered voters residing within the territory"); Ill. Rev. Stat., ch. 24, § 2-3-6 (matter to be submitted to "the electors of such area"); Iowa Code § 368.19 ("qualified electors of the territory or city may vote"); La. Rev. Stat. 33:3(B) ("All of the qualified electors residing within the area proposed for incorporation shall be entitled to vote."); Md. Code Ann. art. 23A, § 25 ("the question of incorporation under the proposed charter shall be submitted to the registered voters of the area proposed to be incorporated"); Mass. Const. Amend. Art II, § 3 (adoption of charter must be submitted "to the voters of the city or town"); Mich. Comp. Laws § 123.1010 ("a referendum on the question of incororation to be held in the area approved for incorporation"); Nev. Rev. Stat. § 266.016 (eligible voter is "a person registered to vote in this state and is a resident of the area to be included in the proposed city"); N.M. Stat. Ann. § 3-2-6(E) ("Any registered voter who is a resident of the territory proposed to be incorporated may vote on the question of incorporating the territory as a municipality."); N.Y. Village Law § 2-216 ("Each resident in such territory qualified to vote for town officers may vote at such election."); N.D. Century Code § 40-02-06 (election to be held "within the boundaries of the proposed municipality"); Ohio Rev. Code Ann. § 707.30 (D) ("Every elector residing in the territory sought to be incorporated under the petition shall be permitted to vote."); 11 Okla. Stat. § 3-102 (election held by "submitting to the registered voters of the proposed town the question of whether or not such territory shall become an incorporated town"); Or. Rev. Stat. § 221.050(1) ("The county court shall submit the proposition for incorporation . . . to the electors registered in the area to be incorporated"); 53 Penn. Stats. § 35202 (question of incorporation to be submitted "to the qualified electors thereof"); R.I. Const. art. 13, § 7 (charter must be

approved by "the electors of the city or town qualified to vote"; § 45-2-1 of the Rhode Island Code allows for city formation only by adoption of a charter); S.C. Code Ann. § 5-1-50 (election held among "all registered voters living in the area sought to be incorporated"); S.D. Codified Laws § 9-3-6 (incorporation requires "the assent of the qualified voters thereof"); Tenn. Code Ann. § 6-1-204 (a) ("All registered voters of the municipality or of the territory of the proposed municipality are eligible to vote in the election."); Tex. Local Gov't Code Ann. § 7.006 ("Each qualified voter who resides within the boundaries of the proposed municipality may vote at the election."); Utah Code Ann. § 10-2-101.5 (petition for incorporation must call for submission "to the legal voters resident within the territory described, for their approval or rejection at a special election"); Wash. Rev. Code § 35.090 ("No person is entitled to vote thereat unless he or she is a qualified voter . . . and has resided within the limits of the proposed city or town for at least 30 days"); W. Va. Code § 8-2-6 ("each qualified elector of the territory sought to be incorporated shall have the right to cast his vote for or against such incorporation"); Wis. Stat. § 66.018 (incorporating by reference § 66.021(5)'s requirement that election be "a referendum of the electors residing in the area"); Wyo. Stat. § 15-1-205(b)(i) ("an election of all qualified electors residing within the territory").

The Petition cites statutes from 15 states granting the franchise both to the detaching and remaining area of a city in the context of municipal *detachment*. Petition at 10, n. 6. This is of no relevance for several reasons. First, as we have seen, the *universal* practice among the States on *this* issue—incorporation of a new municipality—is to require a vote only within the boundaries of the new city. In fact, most of the States to which Petitioner refers have statutes specifically confining the franchise in *incorporations* to the borders of the new city.

Second, detachments are a very different matter. By incorporating, a new municipality does not "secede" from the county in which it lies. As the trial court pointed out, the proponents of the Citrus Heights incorporation are attempting to create a new *city*, not a new *county*. App. to Cert. at 83a. And the trial court could "not find that the City of Citrus Heights is seceding from the County of Sacramento. . . ." App. to Cert. at 83a. Thus, even granting Petitioner its doubtful premise that there is a widespread practice of granting a broader franchise in cases of municipal detachments, it is clear that this is not such a case, and that in the *formation* of new cities the *universal* practice is to limit the franchise to the borders of the new city.

Third, even assuming that States often grant a broader franchise is detachments, this is simply a policy choice. It is clear that States are under no constitutional comsion to do so, *see, e.g., Moorman v. Wood*, 504 F. Supp. 467 (E.D. Ky. 1980), and indeed the Petition cites statutes from many States that limit the franchise to the detaching area. Petition at 10, n. 6.

In the final analysis, then, there is nothing to suggest that any United States election on the incorporation of a new city *ever* involved a county-wide vote. The decisions of this Court do not require such a vote, the decisions of the lower courts reject any suggestion that such an election is constitutionally-compelled, and the 32 states that provide for incorporation elections *all* limit the franchise to the voters residing within the proposed city.

CONCLUSION

Granting this petition would serve no purpose. The decisions of this Court are clear and reject Petitioner's contentions. The decisions of the lower courts, including the persuasive and unanimous opinion of the California Supreme Court below, are not in conflict and universally reject Petitioner's position. Thirty-two of our Nation's

states have statutes like California's, and no State has extended the franchise in incorporation elections in the way that Petitioner suggests is constitutionally-mandated. For these reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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No. 92-1313

In The

Supreme Court of the United States

October Term 1992

SACRAMENTO COUNTY BOARD OF SUPERVISORS,

Petitioner,

v.

SACRAMENTO COUNTY LOCAL AGENCY FORMATION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Does a California statute granting voting rights in incorporation elections only to residents within the proposed city boundaries violate the Equal Protection Clause of the Fourteenth Amendment?

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No. 92-1313

In The

Supreme Court of the United States

October Term 1992

SACRAMENTO COUNTY BOARD
OF SUPERVISORS,

Petitioner,

v.

SACRAMENTO COUNTY LOCAL AGENCY
FORMATION COMMISSION,

Respondent.

**On Petition For A Writ Of Certiorari
To The California Supreme Court**

RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

Respondent must clarify portions of Petitioner's Statement of the Case.

A new city can be created in the State of California by citizen petition pursuant to the Cortese-Knox Local Government Reorganization Act of 1985. Cal. Gov't Code §§ 56000 *et seq.* (West Supp. 1993) (hereinafter "Cortese-Knox Act"). The petition must be signed by at least twenty-five percent (25%) of the registered voters within

the proposed city boundaries. Cal. Gov't Code § 56750 (West Supp. 1993). In 1986, sufficient signatures were gathered to commence review by the Sacramento Local Agency Formation Commission of the proposal to incorporate the city of Citrus Heights, whose population was, at that time, approximately 69,000 persons.

I.

STATEMENT OF FACTS

Petitioner, the Sacramento County Board of Supervisors, is the existing local government within the Citrus Heights area. If incorporation is successful, the County would retain jurisdiction over the area for state government purposes, but local police power and land use authority would rest with the new city. Cal. Const., art. 11, §§ 1(a), 2 (West Supp. 1993).

The filing of a citizen petition does not ensure that an incorporation proposed will be placed on the ballot. Under the Cortese-Knox Act, the Local Agency Formation Commission (hereinafter "LAFCO") is charged with reviewing the petition and conducting public hearings on the matter. Cal. Gov't Code §§ 56021(a), 56069, 56375(a), 56836(b) (West Supp. 1993). Rather than reiterate the numerous protections contained in the Cortese-Knox Act to check and balance the competing interests of local government, Respondent respectfully refers the Court to the California Supreme Court's discussion in the decision below. *See Board of Supervisors*, 3 Cal. 4th at 909-912 (Pet. App. at 5a-10a.)

Contrary to Petitioner's assertion that "it is undisputed that the incorporation of the City of Citrus Heights will cause a significant loss of revenue to the County" (Pet. at 6 n.4), no such impacts are established by the record below. Indeed, at the commencement of the LAFCO proceedings, documents were filed with LAFCO claiming that the incorporation as proposed would have an adverse financial impact upon Sacramento County. However, the proponents of incorporation also filed numerous documents disputing the severity of this impact. As a result, LAFCO adopted several measures and conditions on the incorporation proposal to mitigate these impacts. *Board of Supervisors*, 3 Cal. 4th at 908 (Pet. App. at 3a.)

These measures (discussed by the California Supreme Court) included excluding several sales tax-rich shopping centers from the proposed area of incorporation and requiring that the new city's receipt of property taxes be phased in more slowly. *Id.* Disengenuously ignoring these mitigation measures and conditions, Petitioner's "Selected Excerpts from the Administrative Record Below" (Pet. App. at 86a-105a) *predate* the mitigation measures and conditions imposed by LAFCO.[1] *Board of*

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[1] *See* Pet. App. E: "Selected Excerpts from the Administrative Record Below". The one exception is the Memorandum dated May 24, 1988, from the County Executive to the Board of Supervisors. While this Memorandum was submitted after the lengthy LAFCO hearing process and contained an estimate of financial impacts that LAFCO disputed, LAFCO in fact used that estimate as a basis for concluding that the financial impacts of incorporation were not severe. *Board of Supervisors*, 3 Cal. 4th at 923 (Pet. App. at 23a-24a.)

Supervisors, 3 Cal. 4th at 907-09, 922-23 (Pet. App. at 3a-4a; 23a-24a.)

The trial court found that LAFCO's mitigation measures and conditions resulted in insubstantial financial impacts on Sacramento County. (Pet. App. at 81a, 83a.) By unanimous decision, the California Supreme Court agreed. *Board of Supervisors*, 3 Cal. 4th at 907-09, 923 (Pet. App. at 2a-4a, 24a.)

Finally, as discussed more fully below, Respondent disputes Petitioner's contention that the state law granting voting rights in incorporation elections only to residents within the proposed city boundaries excludes a class directly and substantially affected by the incorporation.

II.

COURSE OF PROCEEDINGS

The trial court did not, as Petitioner claims at page 7 of the Petition, find substantially different interests between annexations and incorporations. The trial court rendered an *oral* statement of decision which is attached to the Petition at Appendix C. This Court will recognize that an oral statement of decision can be less precise than a written one. Nonetheless, the trial court found a *lack of evidence* to support the County's claim that the voting franchise was unconstitutional and found no abridgement of the franchise in an incorporation. (Pet. App. at 83a.)

Not surprisingly, Petitioner relies most heavily on the opinion of the Third District Court of Appeal. (Pet. at 7-10.) It is important to note that the appellate court, in rendering its decision, relied primarily on two California Supreme Court cases, *Citizens Against Forced Annexation v. Local Agency Formation Comm'n*, 32 Cal. 3d 816, 187 Cal. Rptr. 423, 654 P.2d 193 (1982), and *Fullerton Joint Union High School Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 187 Cal. Rptr. 398, 654 P.2d 168 (1982).

However, the California Supreme Court subsequently determined that these cases, *Citizens* and *Fullerton*, were not controlling authority. *Fullerton* was a plurality opinion that lacked authority as precedent. *Board of Supervisors*, 3 Cal. 4th at 918 (Pet. App. at 17a.) The court found *Citizens*, in which a bare majority concurred, constitutionally infirm and not to be followed to the extent inconsistent with the ruling in this case. *Id.* at 920-921 (Pet. App. at 20a-21a.) The California Supreme Court has thus removed the foundation upon which the appellate decision relied.

Likewise, Petitioner's characterization of the California Supreme Court's ruling requires clarification. The California Supreme Court did not find, as stated in the Petition at page 12, that there was just "some fair relationship," between the voting franchise and a legitimate state purpose. Rather, the court held that, "Giving section 57103 the presumption of constitutionality to which every statute is entitled (*People v. Saunders*, 51 Cal. 3d 471, 495, 273 Cal. Rptr. 537, 797 P.2d 561 (1990)), we conclude that

it *must* be given effect if it bears some fair relationship to a legitimate public purpose. (*Plyler v. Doe*, 457 U.S. 202, 206.)" *Board of Supervisors*, 3 Cal. 4th at 923 (Pet. App. at 24a.)

The court then applied the "fair relationship" test to the facts presented and held that the legislature's expressed statutory policy evidenced a legitimate purpose and that Section 57103 was fairly related to that purpose. Recognizing that the Cortese-Knox Act contained an elaborate mechanism to balance the competing political forces present in many government reorganization requests, the California Supreme Court concluded that the Cortese-Knox Act "was constructed with a mighty bulwark against the exercise of arbitrary discretion." *Id.* at 924 (Pet. App. at 25a.)

Contrary to Petitioner's statement on page 13, the California Supreme Court did not find that the state statute resulted in the "disenfranchisement of a class of otherwise qualified voters." Rather, the court held that the "mere fact that a state law touches on the right to vote does not necessarily require the application of strict scrutiny." *Id.* at 914 (Pet. App. at 12a.) In analyzing the facts of the case, the court determined that the application of the rational basis test was the appropriate constitutional test. Ruling that the Cortese-Knox Act survived this analysis, the court properly applied federal precedent.

REASONS FOR DENYING THE WRIT

The California Supreme Court's decision does not conflict with any decision of this Court or any other

court. The decision below turned on its own facts and it will affect few others than the litigants. In its ruling, the California Supreme Court actually chose not to follow its previous rulings because the court found it impossible to reconcile those decisions with the "federal high court's prescription." *Id.* at 920-921 (Pet. App. at 20a.)

Contrary to Petitioner's assertion, this case does not raise an unsettled constitutional issue of national significance. (Pet. at 12.) To Respondent's knowledge, in an incorporation election, *no state grants the right to vote to persons residing outside the boundaries of the proposed city.*[2]

Although the petition is unclear as to whether the constitutional challenge to section 57103 is a "facial" or "as applied" challenge, Petitioner seeks to have this Court determine that Sacramento County residents be treated differently from every other County in the nation. The constitutional question here is not substantial. Petitioner's rights are adequately protected by the state statutory process for municipal creation adopted by the California legislature.[3] In this case there is no substantial

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[2] While Petitioner cites numerous state statutes in the Petition's footnotes, all these statutes reference either municipal detachment or incorporation. None of the statutes allow residents outside the proposed area of an incorporation to vote. (Pet. at 10 n.6, 14 n.8.) (Detachment occurs when voters within an existing municipality desire to detach and join another city or form their own. Incorporation is the creation of a municipality.)

[3] The factual controversy in this case is not material. Petitioner cites to selected documents in the record below which were prepared *prior* to the mitigation measures adopted by Respondent to lessen the financial impacts of incorporation. *See*

financial detriment to persons residing outside the boundaries of the proposed incorporation. *Id.* at 923 (Pet. App. 23a-24a.) In addition, the decision by the California Supreme Court preserves the uniformity of decisions of other states and of this Court.

I.

STATE STATUTES GOVERNING INCORPORATION ELECTIONS ARE PROPERLY REVIEWED UNDER THE RATIONAL BASIS STANDARD.

The sole issue for review in the California Supreme Court was whether California Government Code section 57103 was unconstitutional as applied in Sacramento County. Section 57103 grants voting rights in an incorporation election to only those residing within the proposed boundaries of the new city.

The California Supreme Court *unanimously* ruled that the statute survived a "facial" as well as an "as applied" challenge under the federal and state due process clauses. *Board of Supervisors*, 3 Cal. 4th at 907 (Pet. App. at 1a.) Petitioner argues that the court improperly applied the "rational basis test" to the statute and should have reviewed the statute under the more rigorous "strict scrutiny" test. (Pet. at 15.) However, the California Supreme

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supra at 3-4. Respondent believes Petitioner incorrectly conveys to this Court that these impacts were not addressed. (*See* Pet. at 5-6, 9-10.) The Administrative Record in this case exceeds eleven (11) volumes and over three thousand (3000) pages of documents. After factoring the mitigation measures imposed by Respondent, the trial court and the California Supreme Court did not find any unusual or significant financial impacts. *Board of Supervisors*, 3 Cal. 4th at 922-23 (Pet. App. at 23a-24a.)

Court's treatment is fully consistent with the decisions of this Court, including *Carrington v. Rash*, 380 U.S 89 (1965).

In *Carrington*, the Texas Constitution absolutely prohibited servicemen and women from registering to vote. *Id.* No other state in the union had such a restrictive franchise. *Id.* at 93. The rationale for this provision was to protect the state from "transients" and to prevent the concentrated balloting of military personnel. *Id.* However, the statute effectively deprived all who wore a uniform the right to vote, no matter how long they had lived in the State of Texas. The Court concluded that "[T]here is no indication in the Constitution that occupation affords a permissive basis for distinguishing between qualified voters within the State." *Id.* at 96, *quoting Gray v. Saunders*, 372 U.S. 368, 380 (1963). The Court struck down the classification as unreasonable and lacking a rational basis for its breadth. The Court also indicated that the State could reach its goals of requiring bona fide residence by a less restrictive means. *Id.* at 93, 96.

In contrast to our case, no state extends voting rights to persons outside the proposed boundaries of an incorporation to our knowledge. *Carrington* supports application of the rational relationship standard of review, since there exists a permissive basis for distinguishing between voters within the proposed boundaries of incorporation and those outside.

Carrington does not mandate that all persons with varying interests in an election are constitutionally entitled to vote. In fact, *Carrington* is one of a long line of unbroken authority recognizing the state's broad power to regulate municipal elections and confine the vote to those most interested in the election.

In the seminal constitutional case challenging state regulation of local government organization, *Hunter v. Pittsburgh*, 207 U.S. 161, 178-179 (1907), this Court described that broad power as follows:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. The State . . . at its pleasure may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Petitioner claims that the reliance on *Hunter* by the California Supreme Court was misplaced, and argues that the state's power to create municipalities is qualified by a citizen's right to vote. (Pet. at 19.)[4] We do not read Petitioner's cited cases so broadly.

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[4] Petitioner alleges the California Supreme Court failed to take note that in the *Hunter* case, the First Assignment of Error was rejected. (Pet. at 18 n.10.) However, the *manner* of the due process violation was set forth in the First Assignment of Error and was properly quoted by the Court. *Hunter*, 207 U.S. at 168.

Restrictions on the state's broad discretion are limited. Certainly, the state may not manipulate boundaries for purposes of race discrimination, *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960), nor may a state exclude qualified voters if others *similarly impacted and situated* are granted voting rights, *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632-33 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 702, 806 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204, 212-13 (1970). However, this Court has long recognized the power of the state to regulate local government creation. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 272 (1977).

The rational basis test has been applied by federal courts to statutes which exclude nonresidents from voting on a change in municipal organization. The California Supreme Court recognized these cases, citing *City of New York v. State*, 158 A.D.2d 169, 557 N.Y.S.2d 914 (N.Y. App. Div. 1990), *aff'd*, 76 N.Y.2d 479, 562 N.E.2d 118; *St. Louis County, Mo. v. City of Town & Country*, 590 F. Supp. 731 (E.D. Mo. 1984)[5]; *Moorman v. Wood*, 504 F. Supp. 467 (E.D.

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[5] In *St. Louis County, Mo. v. City of Town & Country*, county and unincorporated area residents sued various municipalities in the process of annexing unincorporated territory within the county. 590 F. Supp. at 732. Pursuant to state law, the municipalities held elections and the vote was limited to residents of the annexing municipality and the unincorporated area territory to be annexed. *Id.* at 733-44. Plaintiffs raised essentially the same arguments raised by Petitioners here, *inter alia*, that municipalities were annexing areas which were a major source of revenue to the county and that the loss of those revenues would severely impact and curtail the municipal services provided to the unincorporated areas. *Id.* at 736. The court ruled

Ky. 1980); *Givorns v. City of Valley*, 598 So. 2d 1338 (Ala. 1992); *Board of Supervisors*, 3 Cal. 4th at 922 (Pet. App. at 22a.)

Most recently, this Court, in *Burdick v. Takushi*, 112 S. Ct. 2059, 2061 (1992), reviewed an election statute placing a total ban on write-in candidates in state elections. The Court applied the rational basis test despite the absolute ban. *Id.* at 2064. In *Burdick*, the Court explained that a burden on the right to vote does not invoke strict scrutiny unless voting rights are subjected to severe restrictions. *Id.* at 2063. If, however, the law only imposes "reasonable, nondiscriminatory restrictions," the law need only bear a rational relationship to the state's interest. *Id.* at 2064.

That restriction of the franchise to those within the proposed new city boundaries as set forth in section

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that "impact alone is not enough to give the latter a right to vote. Just as the residents of a municipality may take actions which affect those residing outside the municipality, even though the latter are not allowed to vote, (*Holt*, 439 U.S. at p. 69), so may the residents of the geographic area allowed to vote here approve annexations which affect those who reside in surrounding areas of the County." *Id.* at 737.

Likewise, In *Little Thunder v. State of South Dakota*, 518 F.2d 1253, 1256 (8th Cir. 1975), the court recognized that voters have a constitutionally recognized interest in an election of government officials that will "exercise general governmental functions" over the disenfranchised individuals. *Id. Little Thunder* is distinguishable and consistent with this case: to wit, it concerned a statutory scheme which disenfranchised residents in unorganized counties in elections for officials that would exercise general government authority over those very individuals. In this case, there is no suggestion that the proposed new city would exercise any general governmental power over those not entitled to vote.

57103 is a reasonable restriction linked to a legitimate state purpose. The exclusion of other residents of the county is not an "invidious or suspect classification" as existed in *Carrington* or in *Evans v. Cornman*, 398 U.S. 419 (1969) but necessary to the orderly growth and development of the State of California as set forth in the Cortese-Knox Act. Cal. Gov't Code § 56001 (West Supp. 1993). Consequently, the California Supreme Court was correct in finding that there was no "suspect classification involved" and properly invoked the deferential standard of review in accordance with this Court's ruling in *Burdick*.[6]

Petitioner argues that the California Supreme Court misapplied the findings of *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1978) (Pet. at 22-28.) In *Lockport*, a New York law provided for concurrent majorities in order to create a new county; a majority of the voting city dwellers and a majority of noncity dwellers. *Id.* at 262. Two separate votes on the referendum were conducted. Both times a majority of the city voters approved the referendum while a majority of the noncity dwellers did not. *Id.* Of total votes cast, a majority of the entire county favored the charter. *Id.* A constitutional challenge ensued

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[6] We believe that the dissenting argument in *Burdick* also supports Respondent's position. The history of the legislation was highly relevant to the dissenting Justice's conclusion that the election law was overly restrictive and not related to a rational state purpose. No such restrictive history is present in this case. In fact, the California Supreme Court found a responsive state legislative process which protects against arbitrary discretion. *Board of Supervisors*, 3 Cal. 4th at 923-24 (Pet. App. at 24a-25a.)

based upon the Equal Protection Clause Ruling that there were genuine differences in the relevant interests of the city and noncity dwellers, this Court unanimously upheld the concurrent-majority requirement. *Id.* at 272. Additionally, this Court did not find any "invidious" discrimination in the statutory scheme. *Id.*

Petitioner seeks to distinguish *Lockport* on the basis that no voting rights are granted in this case to unincorporated area voters living outside the proposed city boundaries, and therefore strict scrutiny should apply. Petitioner cites *Rosario v. Rockefeller*, 410 U.S. 752, *reh'g denied*, 411 U.S. 959 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), for the proposition that absolute disenfranchisement subjects the voting scheme to strict scrutiny. (Pet. at 26-27.)[7] These citations are misplaced. Absolute disenfranchisement of otherwise similarly situated and interested qualified electors may subject a voting restriction to strict scrutiny. But in this case, we do not have such a class and no state recognizes such a class of voters.

The error in Petitioner's argument is that it assumes that unincorporated area residents have a constitutionally

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[7] In *Rosario*, the State of New York enacted the most severe registration restrictions in the nation on previously unaffiliated voters. 410 U.S. at 763. In upholding the restriction, the Court ruled that the restriction was reasonably related to an important state goal. *Id.* at 760. Petitioner argues that since the registration restrictions did not absolutely preclude a voter from affiliating, it is to be contrasted with our case, where an absolute prohibition on voting to nonresidents. (Pet. at 26-27.) However, in our case, these nonresidents do not have a similar interest in the election as residents, nor are they similarly situated.

protected interest in the proposed city. These nonresident unincorporated area voters are not as interested in the incorporation as the proposed new residents since they will not be subject to the representative government of the proposed new city, nor will they be required to submit to any of the city's police power.

The ruling in *Burdick* also provides guidance. In applying the rational relationship test to a total ban on write-in voting, the Court viewed the ban as a reasonable restriction. In this case nonresidents were found by the trial court, and a unanimous California Supreme Court, to be relatively disinterested in the incorporation. *Board of Supervisors*, 3 Cal. 4th at 923. (Pet. App. at 24a.) Certainly these nonresidents' interests are more attenuated than those interests reviewed in *Burdick*. Therefore, application of the rational basis test is appropriate.

Moreover, even though relatively disinterested, these nonresidents are protected in California through the statutory process. The Cortese-Knox Act has numerous provisions requiring LAFCO to mitigate financial impacts upon nonresidents through the statutorily required administrative proceedings. Rather than provide a lengthy recitation of the Cortese-Knox Act's safeguards and how they were applied in this case, Respondent respectfully refers this Court again to the opinion of the California Supreme Court. *See Board of Supervisors*, 3 Cal. 4th at 904-912, 922-925. (Pet. App. at 2a-10a, 22a-24a.)

In light of this reality, Petitioner attempts to focus on Sacramento County as the governmental entity concerned. Petitioner cites *Holt* for the theory that strict scrutiny is required. (Pet. at 25.) However, *Holt* denied

voting rights to a group which *was* subjected to the general government and police powers of a city, unlike the facts of this case. *Holt*, 439 U.S. at 69. In fact, *Holt* recognizes that "extra-territorial impacts" alone are not sufficient to warrant the right to vote. *Id.*

If this Court accepts Petitioner's "impacts" analysis, an individual owning real property within the proposed city boundaries, but not domiciled there, must be enfranchised since he or she too will be impacted by incorporation. Others, as yet unidentified, may also be impacted and thus need to be enfranchised. But this approach defies the history of residency requirements in voting rights cases.

Residency is a prerequisite long identified as a proper restriction on the franchise. *Hill v. Stone*; 421 U.S. 289, 297 (1975). It, along with age and citizenship, are historically rooted in our democratic principles. *Id.* at 297. The California Supreme Court recognized the need to clarify its own rulings in order to avoid precisely the type of impacts analysis advanced by Petitioner. While the California Supreme Court recognized that *Lockport* "did not decide what standard of deference applies when voters with a more *diffuse* interest in an incorporation are *excluded* from voting to confirm the result of a legislative scheme that tries to balance competing interests in the politically freighted process," it recognized that the rational relationship test is entirely consistent with analogous decisions. *Board of Supervisors*, 3 Cal. 4th at 917 (Pet. App. at 15a-16a.)

II.

SECTION 57103 DOES NOT "FENCE OUT" A CLASS OF VOTERS BECAUSE OF THE WAY THEY MAY VOTE.

Petitioner's last argument, that Section 57103 "fences out" a class of voters, reinvokes the ruling in *Carrington*. (Pet. at 28.) *Carrington's* prohibition against "fencing out" a class of voters has no application in this case for the following reasons.

First, no state recognizes the interests of Petitioner as a class of "otherwise qualified electors."

Second, Petitioner mischaracterizes the ruling of the California Supreme Court. The California Supreme Court did not rule, as Petitioner states at page 29, that "Section 57103 fairly serves a legitimate state purpose 'for if large relatively disinterested majorities could veto incorporation, the state's interest in orderly growth and development would be thwarted.' " Rather, the ruling was:

> In section 56001, the legislature announced a policy 'to encourage orderly growth and development . . . *essential to the social, fiscal, and economic well-being of the state,*' and stated that 'the logical formation and determination of local agency boundaries is an important factor in promoting orderly development. . . . The Legislature further finds and declares that this policy should be effected by the logical formation and modification of the boundaries of local agencies.'
>
> *The foregoing sufficiently shows a legitimate purpose in enacting section 57103.* And we conclude that section 57103 is fairly related to the

> Legislature's declared purpose, for if large, relatively disinterested majorities could veto incorporation decided through the Cortese-Knox Act's elaborate process, the result might well hinder orderly growth and development. Thus, there is no invidious discrimination of the type referred to in *Lockport, supra*, 430 U.S. 259.
>
> Unlike in *Fullerton, supra*, 32 Cal.3d 779, which involved a discretionary agency decision to hold an election, the Cortese-Knox Act was constructed with a mighty bulwark against the exercise of arbitrary discretion. The Act accommodates competing local governmental and private interests, narrowly channeling the commission's ultimate determination before the territory's voters consider the decision. The election merely asks the affected residents to confirm that they desire self-government. *To deny the Legislature the authority to let the potentially incorporating territory's voters have the final say in the matter would be to lessen political participation, not increase it.* We do not believe that result is required by our federal and state constitution. *Board of Supervisors*, 3 Cal. 4th at 923-24 (Pet. App. at 24a-25a.) [Emphasis Added]

This ruling does not conflict with this Court's prior decisions. The voters were not excluded *solely* because of the way they may vote, but because of the Legislature's declaration of intent in section 56001 and the Cortese-Knox Act's accommodation of their interests during the administrative hearing before LAFCO.

The California Supreme Court found that the Cortese-Knox Act contained a legitimate intent rationally related to section 57103. The statute, therefore, not only

serves a constitutionally permissible purpose but is essential to the social, fiscal, and economic well-being of the State of California.

CONCLUSION

Based on the foregoing, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-1313

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Petitioner,
vs.
SACRAMENTO COUNTY LOCAL AGENCY FORMATION COMMISSION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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AMICUS CURIAE CITIES

The following cities within the State of California join in submitting this Brief *Amicus Curiae* in Support of Respondents' Opposition to Petition for Writ of Certiorari:

City of Big Bear Lake
City of Chico
City of El Paso de Robles
City of Grover Beach
City of Laguna Hills
City of Milpitas
City of Roseville
City of South Lake Tahoe
City of Walnut Creek

The cities listed above submit this Brief *Amicus Curiae* under the provisions of Rule 37.5 of the Rules of the Supreme Court which allow a political subdivision of a State to submit a Brief *Amicus Curiae* without the consent of the parties when the brief is submitted by the political subdivision's authorized law officer. Counsel of Record, Lois E. Jeffrey, is the City Attorney, and authorized law officer, for the City of Laguna Hills. The other *Amicus Curiae* cities, through their authorized law officers, have submitted letters to Lois E. Jeffrey authorizing those cities to appear as *Amicus Curiae* on this brief. Copies of those letters are being lodged with the Court under separate cover.

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Respondents.

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

Amicus Curiae are cities within the State of California. At the state level, Petitioner proceeded at the Court of Appeal for the State of California, Third Appellate District and the California Supreme Court on the theory that California Government Code section 57103(a), which limits the vote to confirm incorporation of a city to residents within the proposed boundaries of the new city, was unconstitutional as applied to the unique

circumstances of the County of Sacramento. In its Petition for Writ of Certiorari, however, Petitioner argues that section 57103(a) cannot survive constitutional scrutiny in any setting, whether the new city exists in Sacramento County or any other county of the state.

Because of this expanded challenge to section 57103, cities throughout California share a unique interest in opposing this Petition, and can offer this Court guidance regarding the statewide impacts of section 57103 which Respondents cannot address adequately in their oppositions to the petition.[1] Therefore, the *Amicus Curiae* Cities respectfully submit this brief setting forth their reasoning as to why this Court should not issue a writ of certiorari in this instance.

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[1] Cities enjoy a favored position in California government. Article XI, section 2 of the California Constitution directs the Legislature to provide uniform procedures for city formation, and to provide for city powers. In adopting the Municipal Organization Act of 1977, 1977 Cal. Stat. ch. 1253, sec. 9, at 4693, *repealed by*, 1985 Cal. Stat. ch. 541, sec. 1, at 1920 (effective Sept. 9, 1985), and later the Cortese-Knox Local Government Reorganization Act of 1985, Cal. Gov't Code §§ 56000-57550 (West Supp. 1993), the Legislature expressed its intent to promote the orderly formation and expansion of cities in urban areas because cities created the best mechanism for establishing community service priorities and provided more efficient local services. *See* Cal. Gov't Code § 56001 (West Supp. 1993); *Fig Garden Park No. 2 Ass'n v. Local Agency Formation Comm'n*, 162 Cal.App.3d 336, 342, 208 Cal.Rptr. 474, 478 (1984); *Ferrini v. City of San Luis Obispo*, 150 Cal.App.3d 239, 244, 197 Cal.Rptr. 694, 697 (1983). In this case, the California Supreme Court observed: "The evolution of cities is a natural process when population grows and communities begin to form their own identities." *Board of Supervisors v. Local Agency Formation Comm'n*, 3 Cal.4th 903, 907, 838 P.2d 1198, 1200, 13 Cal.Rptr.2d 245, 247 (1992).

SUMMARY OF ARGUMENT

In reaching its decision in *Board of Supervisors v. Local Agency Formation Commission*, 3 Cal.4th 903, 838 P.2d 1198, 13 Cal.Rptr.2d 245 (1992),[2] finding Government Code section 57103 constitutional on its face and as applied, the California Supreme Court properly analyzed and applied a long-line of precedents from this Court. The court found that section 57103 did not have a " ' "real and appreciable impact" upon the equality, fairness, and integrity of the electoral process.' " *Id.* at 914, 838 P.2d at 1204, 13 Cal.Rptr.2d at 251 (quoting *Choudrey v. Free*, 17 Cal.3d 660, 664, 552 P.2d 438, 440, 131 Cal.Rptr. 654, 656 (1976) which quotes *Bullock v. Carter*, 405 U.S. 134, 144 (1972)). The Supreme Court reasoned that individual interests in voting are "much attenuated" by the state's plenary power to oversee and regulate the formation of its political subdivisions and that this plenary power enables the state "to identify as differing in degree the interests of those who may vote under section 57103 and those who may not." 3 Cal.4th at 914, 838 P.2d at 1205, 13 Cal.Rptr.2d at 252. Because the California Supreme Court firmly roots its decision in this Court's holdings, no reason exists for this Court's review. Consequently, *Amicus Curiae* respectfully submits that the Petition for Writ of Certiorari should be denied.

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[2] The opinion is printed in Petitioner's Appendix at pages 1a through 26a.

THE CALIFORNIA SUPREME COURT APPLIED PRECEDENT FROM THIS COURT TO AFFIRM THE VALIDITY OF GOVERNMENT CODE SECTION 57103 IN THE STATE'S STATUTORY SCHEME FOR THE ORDERLY FORMATION OF CITIES

In *Board of Supervisors v. Local Agency Formation Commission*, 3 Cal.4th 903, 838 P.2d 1198, 13 Cal.Rptr.2d 245 (1992), the California Supreme Court considered Petitioner's challenge in the context of the Legislature's traditional power to regulate the formation of political subdivisions. Using that approach, the court indicated that the rational basis test should apply because the Legislature traditionally has the power to regulate the formation of political subdivisions and can determine if residents living outside the territory have a lesser degree of interest in the proposed action than those residing within the territory. *Id.* at 921-22, 838 P.2d at 1209-10, 13 Cal.Rptr.2d at 256-57. The court noted that applying strict scrutiny would (1) greatly unbalance the Legislature's careful accommodation of competing local government and private interests in the Cortese-Knox Act,[3] and (2) undermine the Legislature's power over the existence of cities and counties. *Id.* at

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[3] Contrary to the perception Petitioner leaves, the actual vote by the residents of the proposed new City does not occur in a vacuum. Rather, the vote constitutes the last of a long series of steps, and merely asks the residents of the proposed city if they indeed wish incorporation. Cal. Gov't Code § 57077(a)(2) (West Supp. 1993). *See Board of Supervisors*, 3 Cal.4th at 909-12, 838 P.2d at 1202-03, 13 Cal.Rptr.2d at 250 (describing the elaborate mechanism the California Legislature has established under the Knox-Cortese Act).

921, 838 P.2d at 1209, 13 Cal.Rptr.2d at 256.[4]

In reaching its decision, the California Supreme Court relied upon this Court's unbroken line of precedent. While section 57103 touches upon the fundamental right to vote, *Westberry v. Sanders*, 376 U.S. 1, 17 (1964), that does not necessarily mean that strict scrutiny must apply. *Burdick v. Takushi*, 504 U.S. ___, 112 S.Ct. 2059, 2063 (1992).[5] Unless a "real and appreciable

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[4] As noted by the California Supreme Court, section 57103 gives potential city residents the "final say" in a legislative scheme that balances diverse political and economic interests:

> [T]he voters' role under the Cortese-Knox Act in confirming an incorporation is rather like that of the masons who place a keystone at the apex of a high and intricate arch. The voters' approval is an essential piece, but . . . by the time the question reaches the electorate the incorporation proposal will already have undergone a labyrinthine process containing elaborate safeguards designed to protect the political and economic interests of affected local governments, residents, and landowners.

Board of Supervisors, 3 Cal.4th at 912, 838 P.2d at 1203, 13 Cal.Rptr.2d at 250.

[5] In *Burdick*, this Court stated:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects — at least to some degree — the individuals right to vote and his right to associate with others for political ends." Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest,

(continued)

impact" infringes on the equality, fairness and integrity of the electoral process, *Bullock v. Carter*, 405 U.S. 134, 144 (1972), a voting scheme satisfies the Constitution if it passes the test of minimum rationality — *i.e.*, if it bears some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). *See also Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (the classification must be "rationally related to a legitimate governmental purpose").

This Court has held that cities and counties exist only at the sufferance of the sovereign state. *United Building & Construction Trades v. Mayor*, 465 U.S. 208, 215 (1984). As such, the states possess plenary power to create and dissolve these entities. *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977); *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

In *Lockport*, this Court faced a constitutional challenge to a New York law which provided that a new county charter could go into effect only if approved in a referendum election by concurrent majorities of the county's city and noncity dwellers. In the election in question, a substantial majority of city dwellers approved a proposed city charter, but less numerous noncity voters narrowly defeated it. Consequently, the charter proposal failed because of the concurrent

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(fn. continued)

> as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system "creates barriers . . . [ ] . . . does not itself compel close scrutiny."

Burdick, 504 U.S. at ___, 112 S.Ct. at 2063 (ellipses in original) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) and *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). *See also McDonald v. Board of Election Comm'nrs*, 394 U.S. 802 (1969).

majority provision. An equal protection lawsuit ensued with the plaintiffs claiming that the procedure violated one person-one vote principles because it gave the less numerous noncity voters disproportionate power to thwart the wishes of all those affected by the vote.

In an unanimous opinion, this Court rejected the equal protection contention stating:

> The equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives [*i.e.*, the one person-one vote cases] are of limited relevance ... in analyzing the propriety of recognizing distinctive voter interests in a "single-shot" referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives — instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters. That issue is capable, at least, of being analyzed to determine whether its adoption or rejection will have a disproportionate impact on an identifiable group of voters. If it is found to have such a disproportionate impact, the question then is whether a State can recognize that impact either

by limiting the franchise to the voters specially affected or by giving their votes a special weight.

. . . .

If that question were posed in the context of annexation proceedings, the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could readily be perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation. . . . [¶] [I]n terms of recognizing constituencies with *separate and potentially opposing interests . . . separate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government, which may make the provider of public services more remote and less subject to the voters' influence. [¶] The provisions of New York law here in question no more than recognize*

> *the realities of these substantially differing electoral interests.* Granting to these provisions the presumption of constitutionality to which every duly enacted state and federal law is entitled, we are unable to conclude that they violate the Equal Protection Clause of the Fourteenth Amendment.

Id. at 266, 271-73 (footnotes omitted) (emphasis added).

As noted by the California Supreme Court, "*Lockport* recognizes the high degree of deference due to a voting-based classification when a state undertakes the essentially political task of apportioning power among its political subdivisions — 'constituent units that in a sense compete to provide similar governmental services.' " *Board of Supervisors*, 3 Cal.4th at 916, 838 P.2d at 1206, 13 Cal.Rptr.2d at 253 (quoting *Lockport*, 430 U.S. at 272).

In *Hunter*, the seminal constitutional decision regarding a state procedure regulating the formation and organization of local governmental entities, this Court unanimously rejected a challenge to the validity of a state statute which authorized the consolidation of two cities if a majority of the total votes cast in a referendum in the two cities approved the consolidation. This Court explained the exceedingly broad discretion that a state enjoys in regulating the formation or reorganization of political subdivisions within its boundaries:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and

> duration of the powers conferred upon these corporations rests in the absolute discretion of the State. . . . The State . . . at its pleasure may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation . . . there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Hunter, 207 U.S. at 178-79.

As the California Supreme Court pointed out, *Board of Supervisors*, 3 Cal.4th at 915, 838 P.2d at 1205, 13 Cal.Rptr.2d at 252, while more recent cases from this Court have recognized that *Hunter's* broad language must be qualified to avoid invidious discrimination, *e.g.*,

Gomillion v. Lightfoot, 364 U.S. 339 (1960), those recent decisions have not vacillated from the fundamental proposition that states have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978).

In *Holt*, this Court laid to rest any claim that a state could not limit the vote on a referendum to specific, distinct interests. *Holt* involved a statutory scheme which granted the right to vote for a city's legislators only to persons residing within the city limits, but at the same time gave the city authority to enact police and other regulations governing certain populated areas outside the city boundaries. The residents of the affected area on the outskirts of the city challenged the statute. The affected nonresidents contended that because the city's police regulations directly affected them, they should have the same right as city residents to vote in the city's elections.

This Court rejected that claim, emphasizing that past voting rights cases all recognized the legitimacy of limiting the vote to those persons who were residents of a specific, distinct political area despite whatever effects the vote would have on nonresidents. Spurning a suggestion that any system which denies the right to vote to some persons affected by the decisions of others must be examined under a strict scrutiny test, this Court, citing *Hunter* with approval, reaffirmed that states have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Id.* at 71. Thus, whether the statutory scheme "bear[s] some rational relationship to a legitimate state purpose" comprises the only equal protection question which needs answering. *Id.* at 70.

Quoting *Fort Smith Light Co. v. Paving District*, 2
U.S. 387, 391 (1927), this Court stated in *Holt*:

> "The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective."

Holt, 439 U.S. at 70 (citations omitted). Indeed, in *Ho*
this Court rejected the significant effects test urged
Petitioner:

> Appellants' argument that extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the franchise proves too much. The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders. The granting of building permits for high rise apartments, industrial plants, and the like on the city's fringe unavoidably contributes to problems of traffic congestion, school districting, and law enforcement immediately outside the city. A rate change in the city's sales or ad valorem tax could well have a significant impact on retailers and property values in areas bordering the city.

> The condemnation of real property on the city's edge for construction of a municipal garbage dump or waste treatment plant would have obvious implications for neighboring nonresidents. Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by Alabama's police jurisdiction statutes. *Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about.* And unless one adopts the idea that the Austinian notion of sovereignty, which is presumably embodied to some extent in the authority of a city over a police jurisdiction, distinguishes the direct effects of limited municipal powers over police jurisdiction residents from the indirect though equally dramatic extraterritorial effects of purely internal municipal actions, it makes little sense to say that one requires extension of the franchise while the other does not.

Id. at 69-70 (emphasis added).

Consequently, a state may "constitutionally disenfranchise" those voters who lack the requisite special interest in the subject matter of the election. This Court reached the same conclusion in an earlier decision, *Dunn*

v. Blumstein, 405 U.S. 330 (1972). The *Dunn* Court stated:

> We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. . . . An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.

Id. at 343-44 (citing *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 625 (1969); *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Pope v. Williams*, 193 U.S. 621 (1904)) (footnote omitted).

In the final analysis, then, a statutory provision which forms part of a legislative scheme is not constitutionally suspect simply because it limits the votes to residents of the proposed new city. Although the city may not yet technically be a separate political entity, *Lockport*, *Hunter*, and *Holt* make it clear that a state may determine that the proposed residents' interests are sufficiently different from others who may be affected by the cityhood proposal that the proposed city can be properly treated as a distinct entity for the purpose of confirming an incorporation proposal. In this case, the California Supreme Court found "genuinely different relevant interests" between residents in the area to be incorporated and the remaining county residents. *Board of Supervisors*, 3 Cal.4th at 917, 838 P.2d at 1206, 13 Cal.Rptr.2d at 253. Limiting the vote to confirm incorporation to those most interested was fairly related to

the Legislature's purpose of promoting orderly growth and development. *Id.* at 923, 838 P.2d at 1211, 13 Cal.Rptr.2d at 258.

Petitioner's attempt to invoke the strict scrutiny standard is not in line with this Court's rulings in *Hunter, Lockport*, or *Holt*. Petitioner's claim that the case raises unsettled constitutional issues of national significance rests upon a misapplication of other case law. The California Supreme Court appropriately applied this Court's rulings in upholding the validity of section 57103 in the context of the orderly formation of cities under California law. As a result, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Petitioner misinterprets this Court's rulings when it suggests that the California Supreme Court employed faulty analysis in upholding the constitutionality of Government Code section 57103. This Court has repeatedly stated that states have plenary authority over their political subdivisions. So long as a statutory scheme does not cause, on its face, invidious discrimination based on such characteristics as race, the scheme will not be subject to strict scrutiny. Rather, the scheme will survive constitutional scrutiny if it bears some fair relationship to a legitimate governmental purpose. Here, Government Code section 57103 constitutes one part of a larger, deliberative statutory scheme for the incorporation of new cities throughout the State of California. Limiting the vote to confirm incorporation to those most interested, the new city's residents, is rationally related to the state's objective of promoting the orderly growth and development of cities. Because this area of the law has been long-settled, and this case raises no new issues,

Amicus Curiae respectfully submits that this Court deny Petitioner's request for a writ of certiorari.

Dated: March 5, 1993.

Respectfully submitted,

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